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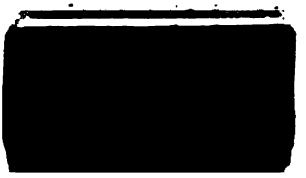

THE THEORY OF THE STATE

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BY

J. K. BLUNTSCHLI. 1808-1881

LATE PROFESSOR OF POLITICAL SCIENCES IN THE UNIVERSITY OF HEIDELBERG

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TRANSLATORS' PREFACE

THE 'Theory of the Modern State' (*Lehre vom modernen Staat*) by the late Professor Johann Kaspar Bluntschli, of Heidelberg, may be described as an attempt to do for the European State what Aristotle accomplished for the Hellenic. The material being far more complex, the task is very much more difficult, but Bluntschli's is, at least, the most successful attempt that has been made. We have hardly any works in English which we can put beside it in respect of intention and compass; and of these, none is equally useful for the student. No writer can escape the influence of his surroundings, and although Germany was only his adopted country, he being a native of Zürich, Bluntschli's point of view is sometimes too exclusively German. But perhaps this is not altogether a disadvantage to us: the endeavour to understand a mode of looking at some political subjects, different from that to which we are accustomed, may not be without its uses. On the whole, Bluntschli is a candid and fair critic both of actual constitutions and of political theories. Occasionally he may betray some of the prejudices of German officialism; occasionally, too, he may push to a somewhat amusing extreme his 'organic' or 'psychological' conception of the State.

But these are slight defects, more likely to throw light on the individuality of the author than to mislead the judicious reader.

The work here translated, the *Allgemeine Statslehre*, is only the first part of the 'Theory of the Modern State.' The relation of the other two parts, the *Allgemeines Statsrecht* and *Politik*, to it and to one another is explained in Chapter I of the Introduction. This first part goes over the whole ground of what we call 'Political Science,' though some subjects are treated in much greater detail in the two other parts[1].

The translators have not aimed at a rigid uniformity. Where there seemed a risk of misstating the author's ideas, a more literal style has been employed than where the meaning was quite obvious, and occasionally considerable abridgment has been found possible. One of the chief difficulties has arisen from the impossibility of getting exact equivalents to the technical terms of German Law and Politics. As the use of a translation is not limited to those who know nothing of the original language, the practice has been adopted of giving the German words in brackets, after the English, in all cases where this seemed likely to save ambiguity or to help the student. It is a peculiar misfortune of our language to have no precise term for *Recht (jus, droit, diritto, τὸ δίκαιον)* as distinguished from *Gesetz (lex, loi, legge, νόμος)*. We are driven to use 'Law' and 'legal' in a conventional way (thus *Statsrecht*= Public Law, *Rechtsstat*

[1] In 1852 Bluntschli published his *Allgemeines Statsrecht geschichtlich begründet* in one volume. It afterwards grew into two volumes. Finally, when a fifth edition (1875) became necessary, he added the volume called *Politik*, the two other parts corresponding in the main to the two volumes of the original *Statsrecht*.

=legal state, etc.), though these terms fail to express the distinction[1]. Sometimes, but rarely, the word 'Right' has been used, e. g. where it was necessary to bring out the antithesis between Right and Might. Bluntschli himself remarked on the difference between the German and English uses of *Volk* and 'people,' *Nation* and 'nation' (Book II, Ch. ii); but it will be found that he goes too far in supposing our use to be the exact converse of the German[2]. The fact is, our word 'people,' though often less political in its signification than *Volk*, is more political than the German word *Nation*. Thus we must translate *Volksvertretung* by 'Representation of the people,' and we can only render *Populus Romanus* by 'the Roman people.' In many cases where Bluntschli uses the term 'State' (*Stat*) it would be more idiomatic English to say 'nation,' which is more exclusively political in its meaning than the German *Volk*; but the word 'State' has been advisedly retained everywhere as a technical term to translate *Stat*, except where it occurs in compounds such as *Statsrecht*. It should be noted however that *Stat* is always much wider than our term 'Government,' with which 'State' is often used convertibly. 'Government,' again, because of this frequent equivalence with 'State,' is wider than the German *Regierung*, which

[1] A good account of the different terms for 'Law' will be found in Clark's *Practical Jurisprudence, a Comment on Austin*. It would be interesting to trace the connexion between some peculiarities of English Jurisprudence and this want of a distinctive word for *Jus*. On the other side, we have escaped some of the temptations into which the vagueness of the German *Recht* has led the theorists of *Naturrecht*. Our phrase 'rights' is at least shorter than *Recht in subjectiver Hinsicht*. (Cp. Sir F. Pollock in his *History of the Science of Politics*, pp. 114, 115; Prof. Holland's *Jurisprudence*, 2nd edit., pp. 63, 275 *note*.)

[2] Steinthal, *Allgemeine Ethik*, p. 425, gives a meaning to the German words which is the precise converse of that given by Bluntschli.

excludes the function of legislation (see Book VII, Ch. vii) and often means little more than 'administration,' though distinguished from it (p. 430). The word *Stände* has been translated 'privileged classes, orders or estates,' though 'Estates' is generally limited to the estates as assembled in Parliament (see Book II, Ch. vii).

The French version by M. Riedmatten, who has also translated the *Allgemeines Statsrecht* (*Le droit public général*) and the *Politik*, has been of great service, especially in regard to those many political terms which we have in common with the French rather than the German language.

The references given by Bluntschli in the foot-notes have been carefully verified as far as possible. Several of them, unfortunately, are to works not easily accessible in this country. In many cases they have been corrected and supplemented. Additional references have been made to Aristotle's *Politics*. In these the books are quoted according to the order of the MSS. and the old editions, *not* the conjectural order of St. Hilaire, etc., adopted by Congreve and Welldon. The chapters and sections are those of the Oxford edition of Bekker, and the pages of the great Berlin edition of Aristotle have in most cases been added.

The translation has been made with the sanction of the German publishers: and the translators have had the advantage of using Professor Löning's corrections for a new (sixth) edition of the work, which is in course of publication. Most of Professor Löning's additions and alterations have been adopted. Where new notes are added by him they are marked [1a], etc. Notes and additions for which the translators alone are responsible are enclosed in square brackets. Obvious corrections have been silently made. A marginal analysis has been added, and has helped to free

the text from an excess of italics, and occasionally to simplify the translation. For convenience of reference, this analysis is reproduced in the table of contents.

The translation was undertaken primarily in the interests of the School of Modern History. As it was desirable to avoid delay, the work was entrusted to three separate hands, but it has been subjected to a mutual revision by the translators. The original division of labour was as follows :—

Books I, IV, and VII, by D. G. RITCHIE, M.A., Fellow and Tutor of Jesus College and sometime Tutor of Balliol College.

Books II and III, by P. E. MATHESON, M.A., Fellow and Tutor of New College.

Books V and VI, by R. LODGE, M.A., Fellow and Tutor of Brasenose College.

IN this second edition the opportunity has been taken to correct some slight errors. A few additional references have been inserted by the Translators, chiefly to recent English books on Political Science. No change of importance has been made, except in the Translators' note[a] on Book IV, ch. ix, p. 294, where Locke's form of the Social Contract theory has been more correctly represented than in the first edition.

OXFORD, *June*, 1892.

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THE THEORY OF THE STATE

INTRODUCTION.

CHAPTER I.

POLITICAL SCIENCE.

Political Science defined.

POLITICAL Science (*die Statswissenschaft*) in the proper sense is the science which is concerned with the State, which endeavours to understand and comprehend the State in its conditions (*Grundlagen*), in its essential nature (*Wesen*), its various forms or manifestations (*Erscheinungsformen*), its development.

It does not include certain sciences which are auxiliary to it.

Thus many sciences, which are sometimes regarded as political sciences, are not really such, although they relate to the State and must of course be taken account of as auxiliary. Such are:—

(*a*) The *History* of a people or nation, except in so far as it is exclusively political or constitutional history. The general course of events in a people's life, the acts of individuals, the history of art, science, economic conditions, morals, diplomatic and political struggles, military affairs—all these form no part of political science.

(*b*) *Statistics*, so far as they include social and private matters and are not exclusively political.

(*c*) *Political Economy* (*Nationalökonomie*), so far as it is an enquiry into economic laws which are applicable to every one and not merely to the State.

(*d*) The study of *society*, so far as the life of society goes on of itself and is not identical with the life of the State.

Political Science divided into Public Law and Politics.

The ancient Greeks applied the name πολιτική to all political science. We [Germans] distinguish Public Law (*Statsrecht*) and Politics (*Politik*) as two special sciences. Alongside of these we put many special branches with distinct names, e. g. Political Statistics, Administration, International Law (*Völkerrecht*), Police, &c.

Public Law and Politics both consider the State on the whole, but each from a different point of view and in a different direction. In order to understand the State more thoroughly, we distinguish its two main aspects—its existence and its life. We examine the parts in order more completely to comprehend the whole. In this procedure there are not only theoretic but practical advantages. Law (*das Recht*) has gained in clearness, moderation, and strength, since it has been more sharply distinguished from politics; and Politics has gained in fullness and in freedom by being considered separately.

Public Law (*Statsrecht*) *deals with the State as it is*, i. e. its normal arrangements, the permanent conditions of its existence.

Politics (*Politik*), on the other hand, has to do with *the life and conduct of the State*, pointing out the end towards which public efforts are directed and teaching the means which lead to these ends, observing the action of laws upon facts and considering how to avoid injurious consequences and how to remedy the defects of existing arrangements.

Public Law is thus related to Politics as order to freedom, as the tranquil fixedness of relations to their complex movement, as bodies are related to their actions and to the various mental movements. Public Law asks whether what is conforms to law: Politics whether the action conforms to the end in view.

Public Law and Politics distinguished from Ethics.

Both Public Law and Politics have a moral content (*ein sittlicher Gehalt*). The State has a moral nature (*ist ein sittliches Wesen*) and moral duties. But Law and Politics

are not determined solely nor completely by moral laws (*Sittengesetz*). They are independent sciences, and not simply chapters of a Moral Philosophy. On the contrary, their basis and their end are to be found in the State: they are Political Sciences. Ethics, however, is not a Political Science, because its fundamental principles cannot be explained out of the State, but have a wider and nobler basis in the universal nature of mankind and in the divine ordering of the world.

Their relation to one another.

Public Law and Politics must not be absolutely separated from one another. The actual State lives, i. e. it is a combination of Law and Politics. Again, Law is not absolutely fixed or unalterable; and the movement of Politics has rest as its aim. Law is not merely a system, it has a history; on the other hand, Politics has to do with legislation. As with all organic beings, the influence is reciprocal. The difference we have recognised is not thereby set aside, but is better explained. The distinction between the history of Law (*Rechtsgeschichte*) and political history is just this: the former has only to point out the development of the normal and established existence of the State and to describe the rise and change of permanent institutions and laws: the latter lays stress chiefly on the changing fortunes and circumstances of the nation, the motives and conduct of its statesmen, and the actions and sufferings of both the nation and its statesmen. The highest and purest expression of Public Law is to be found in the Constitution or enacted positive laws (*die Verfassung: das Gesetz*): the clearest and most vivid manifestation of Politics is the practical conduct or guidance of the State itself, viz. Government (*Regierung*). Politics is more of an art than a science. Law is a presupposition of Politics, a fundamental (though not of course the only) condition of its freedom. Politics in its course must have regard to legal limits, caring as it does for the varying needs of life. Law, on the other hand, requires the help of Politics in order to escape the numbness of death and to keep step with the development of life.

Without the animating breath of politics the *corpus juris* (*Rechtskörper*) would be a corpse; without the foundations and the limits of Law, Politics would perish in unbridled selfishness and in a fatal passion for destruction.

The Theory of the State *in general* to be considered first.

It is solely for the sake of clearness and simplicity that before these two branches of the Theory of the State—Public Law and Politics—we place a third, or rather a first, division of Political Science, viz. The Theory of the State *in general* (*Allgemeine Statslehre*). In this we consider the State *as a whole* without as yet distinguishing its two aspects (Law and Politics). The conception of the State, its basis, its principal elements (the people, the country), its rise, its end or aim, the chief forms of its constitution, the definition and the division of sovereignty (*Statsgewalt*) form the subjects of the Theory of the State in general, and this in turn is at the base of the two special political sciences, Public Law and Politics.

The first part of this work is devoted to the Theory of the State in General, the second to Public Law, and the third to Politics.

[*Note.*—The present translation only comprises this first part.]

CHAPTER II.

SCIENTIFIC METHODS.

THE scientific study of the State may be undertaken from different points of view and in different ways. There are two sound methods of scientific enquiry, and two false methods which are the one-sided perversions of them. The correct methods, we may call the *philosophical* and the *historical*. The perversions come from pushing to an extreme one prominent aspect of the first two methods. *Abstract ideology* is the exaggeration and caricature of the philosophical, *mere empiricism* of the historical method.

Methods true and false.

The contrast between the two methods is connected partly with the characteristics of both Law and Politics, partly with the difference in the intellectual temperaments of those who have pursued these studies.

All Law and all Politics have an *ideal* side—a moral and spiritual element, but both at the same time rest on a *real* (actual) foundation and have a material form and value. This latter side is misunderstood and disregarded by the ideologist, who thinks out some political principle in its abstractness and draws from it a series of logical consequences without paying any regard to the facts of actual political society. Even Plato in his *Republic* has fallen into this error and adopted opinions contrary to nature and the needs of mankind; and yet the richness of Plato's spirit and his feeling for beauty have saved him from those miserably arid formulas which we find so often in the

Ideology.

political philosophy of modern writers. The State is a moral organism and not the product of mere cold Logic: Public Law is not a collection of speculative opinions.

This method leads to unfruitful results in theory, and when transferred to practice gives a most dangerous influence to fixed ideas and tends to break up and destroy existing political institutions. In times of revolution men's passions are set free and they are attracted by these abstract doctrines, the more so that they hope by their aid to break through the bounds of law: and this sort of ideology easily obtains a terrible force, and, incapable of creating a new organism, throws down everything before it with the energy of a demon. The truth of this observation is proved in a fearful way by certain phases of the French Revolution. Napoleon was right when he said: 'The Metaphysicians, the Ideologists have destroyed France.' The ideological acceptation of 'Liberty and Equality' has filled France with ruins and drenched it with blood. The *doctrinaire* application of the 'monarchical principle,' has repressed the political freedom of Germany and hindered the growth of her power. The carrying out of the abstract principle of nationality has threatened the peace of all Europe. The truest and most fruitful ideas become mischievous if they are taken up by ideologists and then transferred to practice by narrow fanatics.

Empiricism. The exclusively empirical method is one-sided in the opposite way; it holds to the mere outward form, to the letter of the law or to the apparent fact. This method in science is valuable at the most in amassing material in compilations; in actual politics it frequently gains many adherents, especially among the officials of a bureaucracy. Empiricism does not often, like ideology, directly endanger the whole State; but it makes the bright sword of justice rust, hinders the public welfare in all sorts of ways, causes a quantity of small injuries, weakens the moral vigour and enfeebles the health of the State in such wise that in critical times its salvation is made always difficult and

sometimes impossible. While the practical application of mere ideology brings the State into the acute crisis of political fever, this mere empiricism rather produces chronic maladies.

The historical method.

The advantage of the historical over the merely empirical method is that it does not thoughtlessly and servilely honour actual institutions and actual facts, but recognises, explains, and interprets the inner connection between Past and Present, the organic development of national life and the *moral idea* as revealed in its history. This method certainly starts from the actual phenomena, but regards them as living, not as dead.

The philosophical.

Akin to the truly historical is the truly philosophical method, which is not one of mere abstract speculation but of 'concrete thinking'[a] (*concret denkt*), i. e. it unites together Ideas and Facts (*Idee und Realität*). While the historical method is based upon the course of outward events and their evolution, the philosophical starts from the knowledge of the human mind, and from that point of view considers the revelation of the spirit of man in history.

These methods united by the greatest writers.

Most of those who have attained to a higher scientific standpoint have through natural temperament gone in either the one or the other direction. Only a few have had the genius to unite both. Among these Aristotle especially deserves our admiration. His 'Politics,' although written in that youthful period of the world's history which preceded the more advanced development of the State, has yet remained for two thousand years one of the purest sources of political wisdom. Cicero imitated, in the form of his reasoning and his mode of exposition, the philosophical manner of the more richly gifted Greeks, but the best part of the material of his work he rightly took from the practical politics of Rome. Among modern writers, Bodin, Vico, and Bacon may be named as early representatives of the philosophic-historical method. Burke, who resembles Cicero

[a] [For an explanation of this phrase of German philosophy see Wallace's Translation of Hegel's *Logic*, Prolegomena, Ch. x.]

in the grandeur and charm of his eloquence, resembles him also in the way in which he grasped the principles of political wisdom from the history and life of his country, and expressed them with the dignity of philosophy and the splendour of genius. Machiavelli, who has stored up in his works the abundant and sad experience of a profound and shrewd knowledge of mankind, and Montesquieu who looked on the world with a frank, cheerful glance and abounds in acute remarks and exact observations, sometimes adopt one method, sometimes the other. Yet the former is more given to the historical, the latter to the philosophical [b]. On the other hand, Rousseau and Bentham, like most of the Germans, keep rather to the philosophical method, but, more often than their great model Plato, they fall into the one-sided error of mere ideology.

The historical and philosophical methods supplement and correct each other.

It is thus clear that the two methods, the historical and philosophical, do not conflict: they rather supplement and correct one another. He assuredly takes a limited and narrow view of history who thinks that with him history is at an end and no new legal conception (*Recht*) can arise; and he is a vain and foolish philosopher who thinks that he is the beginning and end of all truth. The genuine historian as such is compelled to recognise the value of philosophy, and the true philosopher must equally take counsel of history.

Each of the two methods has its peculiar advantages and its peculiar weaknesses and dangers. The chief advantage of the historical method is the abundance and the positive character of its results; for history is full of the complexity of life and at the same time is thoroughly positive. Whatever the most prolific thinker may think out in his head will always be only a poor fragment compared with the thoughts which are revealed in the history of mankind, and will generally attain only an uncertain and misty shape. But, on the other hand, there is the danger that, in following the

[b] [So in German (ed. 1875). The French Transl. (2nd edit.) reverses the remark.]

paths of history, we may forget and lose unity in abundant multiplicity; we may be oppressed by the weight of the material, overwhelmed by the mass of historical experience, and above all, attracted and enchained by the past, we may lose the fresh outlook on the life of the present and the future. Certainly these are by no means necessary consequences of the historical method, but history itself shows us how often men who have given themselves ardently to the study of it go wrong in this way.

The advantages of the philosophical method, on the contrary, are: purity, harmony and unity of system, fuller satisfaction of the universal striving of man towards perfection, ideality. Its results have an especially human character, an especially ideal stamp. And yet, in turn, it has its peculiar dangers: philosophers, in their striving after unity—which they often regard as their sole aim,—overlook the inner complexity of nature, and the rich content of actual existence; following the swift flight of free thought, not infrequently, instead of discovering real laws, they find barren formulæ, empty husks, and take to playing with these; misunderstanding the natural development, they pluck unripe fruit, plant trees without roots in the ground, and sink into the delusions of ideology. Only a few philosophical spirits have succeeded in avoiding these errors.

Note. In what I wrote in 1841 on 'The modern schools of Jurisprudence in Germany' (*Die neueren Rechtsschulen der deutschen Juristen*, 2nd edit. Zürich, 1862), these and similar ideas have been followed out in closer connection with German scientific study. Long ago, however, the English Lord Chancellor, Bacon, censured the errors of the Law of Nature and the positive jurisprudence as studied in his time and expected the necessary reform in the science of law from the combination of history with philosophy. [Cp. *De Augm. Scient.* viii. c. 3. But see Flint's *Vico*, p. 151.]

CHAPTER III.

GENERAL AND SPECIAL POLITICAL SCIENCE.

SPECIAL Political Science is limited to a particular nation and a single State, e. g. the ancient Roman Republic, the modern English Constitution, the German Empire of to-day.

General Political Science, on the other hand, rests upon a universal conception of THE State. The particular State is based on a particular people, the State in general on mankind[1].

The general theory of the State, and especially general Public Law, is very often held to be the product of pure speculation, and the attempt is made to deduce it, by mere logical consequences, from a speculative view of the world. Thus there have arisen various systems of *Natural* or Philosophical 'Public Law,' as distinct from that which is *Positive* and Historical. I understand the difference otherwise. The State must be philosophically comprehended as well as historically. Neither General nor Special Public Law can dispense with this twofold work.

The special theory of the State presupposes the general, as the particular character of a people presupposes the

[1] The same idea is at the base of the Roman view. L. 9 (*Gaius*) D. de Justitia et Jure: 'Omnes populi, qui legibus et moribus reguntur, partim *suo proprio*, partim *communi omnium hominum jure* utuntur. Nam quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est, vocaturque *jus civile*; quod vero naturalis ratio inter omnes homines constituit, id apud omnes peraeque custoditur, vocaturque *jus gentium*, quasi quo jure omnes gentes utuntur.' [Justinian, *Inst.* Lib. I. Tit. ii. § 1.]

common nature of mankind. General Political Science has to do with the fundamental conceptions, which appear in all sorts of ways, in the theories of particular States. The history to which the former pays regard is the history of the World or universal history, not the history of a particular country, and of a particular State. The speculations of Political Philosophy must be tested and supplemented by the actual history of mankind. Universal history shows us the different stages of development which mankind has lived through since its infancy; each stage has its own peculiar views of the State, and its own political formations. We learn to understand in what ways the various nations have taken part in the common task of the human race.

General Political Science is based on Universal History.

Not all periods of universal history, nor all nations, have the same significance for our science. We are specially concerned with the modern State. The ancient and mediæval forms of the State need only be considered as preliminary, and in order, by contrast, to bring out more clearly the character of the modern State. The value of different peoples for the formation of the modern State is determined in general by their share in the progress of political civilisation, i. e. of a community of men at once orderly and free. In the history of the world, the Aryan or Indo-Germanic race is as significant for politics as the Semitic race for religion; but not until they came to Europe did even the Aryans attain a high and conscious political development. Among them the Greeks and Romans took precedence in antiquity, the Teutons (*Germanen*) in the Middle Ages; but our modern political civilisation depends chiefly on the mixture of Græco-Roman and Teutonic elements. The chief share in this modern political development has been taken by: (1) the English, whose very *race* is a mixed one, (2) secondly by the French, who combine Old Celtic and Romance with Teutonic elements, and (3) lastly the Prussians, in whom the manly self-confidence and sense of Law (*Rechtssinn*) of the Teuton is combined with the pliancy and submissiveness of the Slav. The political

What periods and what races are significant.

life of America is derived from that of Europe, but it is only in the United States that it has made progress of its own.

General political science has thus to do with the common political consciousness of civilised mankind at the present time, and the fundamental ideas and essentially common institutions which appear in various ways in different States. Even General Public Law is no mere theory—it has a positive although indirect influence, as it operates through various particular States, and not through one universal State. Like mankind and his history, it has a real, and not merely an ideal existence.

Note.—The contrast in Aristotle's Rhetoric (i. 10. 1368 b. 7) between *νόμος ἴδιος* and *νόμος κοινός* is different from that which we have been considering. The former means the Law which a particular state has worked out for itself, whether written or unwritten, the latter that which is right by nature (*φύσει κοινὸν δίκαιον*) without regard to any political community.

BOOK I.

THE CONCEPTION OF THE STATE.

CHAPTER I.

THE CONCEPTION AND IDEA OF THE STATE. THE GENERAL CONCEPTION OF THE STATE.

THE conception (*Begriff*) of the State has to do with the nature and essential characteristics of actual States. The idea or ideal (*Idee*) of the State presents a picture, in the splendour of imaginary perfection, of the State as not yet realised, but to be striven for.

The conception of the State can only be discovered by history; the idea of the State is called up by philosophical speculation. The universal conception of the State is recognised when the many actual States which have appeared in the world's history have been surveyed, and their common characteristics discovered. The highest idea of the State is beheld when the tendency of human nature to political society is considered, and the highest conceivable and possible development of this tendency is regarded as the political end of mankind.

The conception of the State arrived at by history: the idea by philosophy.

If we consider the great number of States which history presents to us, we become aware at once of certain common characteristics of all States; others are only seen on closer examination.

Characteristics of all States:

First, it is clear that in every State a number of men are combined. In particular States the number may be very different, some embracing only a few thousands, others many millions; but, nevertheless, we cannot talk of a State

1. a number of men;

until we get beyond the circle of a single family, and until a multitude of men (i.e. families, men, women, and children) are united together. A family, a clan, like the house of the Hebrew patriarch, Jacob, can become the nucleus round which, in time, a greater number gathers, but a real State cannot be formed until that has happened, until the single family has broken up into a series of families, and kindred has become extended to the race. The horde is not yet a tribe (*Völkerschaft*). Without a tribe, or, at a higher stage of civilisation, without a nation (*Volk*), there is no State.

There is no normal number for the size of the population of a State[a]; Rousseau's number of 10,000 men would certainly not be sufficient. In the middle ages such small States could exist with security and dignity; modern times lead to the formation of much greater States, partly because the political duties of the modern State need a greater national force, partly because the increased power of the great States readily becomes a danger and a menace to the independence of the small.

Secondly, a permanent relation of the people to the soil is necessary for the continuance of the State. The State requires its territory: nation and country go together.

Nomadic peoples, although they have chiefs to command them and law to govern them, have not yet reached the full condition of States until they have a fixed abode. The Hebrew people received a political training from Moses, but were not a State until Joshua settled them in Palestine. In the great migrations at the fall of the Roman empire, when peoples left their old habitations and undertook to conquer new ones, they were in an uncertain state of transition. The earlier States which they had formed no longer existed: the new did not yet exist. The personal bond continued for a while—the territorial connection was broken.

[a] [For Aristotle's views on this subject, cp. *Pol.* vii. 4: in *Eth. Nic.* ix. 10. § 3, he says there cannot be a State (πόλις) of ten men nor of 100,000. Cp. also *Pol.* iii. 3. § 5.]

Only if they succeeded in regaining a sure footing were they enabled to establish a new State. The peoples who failed perished. The Athenians under Themistocles saved the State of Athens on their ships, because after the victory they again took possession of their city; but the Cimbri and Teutones perished, because they left their old home and failed to conquer a new one. Even the Roman State would have perished, if the Romans, after the burning of their city, had migrated to Veii.

Another characteristic of the State is the unity of the whole, the cohesion of the nation. Internally there may indeed be different divisions with considerable independence of their own. Thus in Rome there was the patrician *populus*, and alongside of it the *plebs*. In the older Teutonic states of the middle ages there was the constitution of the people alongside of the feudal constitution. The State may also be composed of several parts which in their turn constitute States: thus from the old German Empire several territorial States have gradually grown up: in the modern federations of North America and Switzerland, and in the new German Empire, a common collective State (*Gesammtstat*) and a number of confederated local States exist together. But unless the community forms a coherent whole in its internal organisation, or can appear and act as a unit in external relations, there is no State. 3. unity;

In all States we find the distinction (*Gegensatz*) between governors and governed, or—to adopt an old expression which has been sometimes misunderstood, sometimes misused, but which in itself is neither hateful nor slavish—between sovereign and subjects. This distinction appears in the most manifold forms, but is always necessary. Even in the most extreme democracy in which it may seem to vanish, it is nevertheless present. The assembly of the Athenian citizens was the sovereign, the individual Athenians were its subjects. 4. distinction between rulers and subjects;

Where there is no longer any sovereign possessing authority, where the governed have renounced political

obedience, and every one does that which is right in his own eyes, this is anarchy and the State is at an end. Anarchy, like all negations, cannot last, so that out of it there at once arises, perhaps in a rude and often cruel form of despotism, some sort of new sovereignty which compels obedience, and thus reproduces that indispensable distinction. Communists deny this in theory, but in doing so, they deny the State itself. Even they have nowhere been able by annihilating the State to introduce a merely social union, and, if they ever succeed in temporarily winning over the masses to their projects, we may be certain, from the example of the religious communists of the sixteenth century, the Anabaptists, and from the natural consequences of events, that they too would again set up a domination, and that the harshest that has ever been.

Among the Slavonic peoples we find the old idea that only the unanimity of all the members of a community represents the common will, and that neither the majority nor any higher authority can decide. This principle however can at the most only serve as a principle of local communities, and that only among a people where all easily and quickly agree; it can never be a political principle, for the State must override the unavoidable opposition of individuals.

5. an organic nature.

The State is in no way a lifeless instrument, a dead machine: it is a living and therefore organised being. This organic nature of the State has not always been understood. Political peoples had indeed an image (*Vorstellung*) of it, and recognized it consciously in language, but the insight into the political organism remained long concealed from political science, and even at the present day many publicists (*Statsgelehrte*) fail to understand it. It is the especial merit of the German school of historical jurists to have recognized the organic nature of the Nation and the State. This conception refutes both the mathematical and mechanical view of the State, and the atomistic way of treating it, which forgets the whole in the individuals. An

oil-painting is something other than a mere aggregation of drops of oil and colour, a statue is something other than a combination of marble particles, a man is not a mere quantity of cells and blood corpuscles; and so too the nation is not a mere sum of citizens, and the State is not a mere collection of external regulations.

The State indeed is not a product of nature, and therefore it is not a natural organism; it is indirectly the work of man. The tendency to political life is to be found in human nature, and so far the State has a natural basis; but the realisation of this political tendency has been left to human labour[a], and human arrangement, and so far the State is a product of human activity, and its organism is a copy of a natural organism.

In what sense the State is an organism.

In calling the State an organism we are not thinking of the activities by which plants and animals seek, consume and assimilate nourishment, and reproduce their species. We are thinking rather of the following characteristics of natural organisms:—

(*a*) Every organism is a union of soul and body, i. e. of material elements and vital forces.

(*b*) Although an organism is and remains a whole, yet in its parts it has members, which are animated by special motives and capacities, in order to satisfy in various ways the varying needs of the whole itself.

(*c*) The organism develops itself from within outwards, and has an external growth.

In all three respects the organic nature of the State is evident.

(*a*) The State has spirit and body.

In the State spirit and body, will and active organs are necessarily bound together in one life. The one national spirit, which is something different from the average sum of the contemporary spirit of all citizens, is the spirit of the State; the one national will, which is different from the

[a] [Cp. Arist. *Pol.* i. 2. § 15, 1253 a. 30: *Φύσει μὲν οὖν ἡ ὁρμὴ ἐν πᾶσιν ἐπὶ τὴν τοιαύτην κοινωνίαν· ὁ δὲ πρῶτος συστήσας μεγίστων ἀγαθῶν αἴτιος.*]

average will of the multitude, is the will of the State. The constitution, with its organs for representing the whole and expressing the will of the State in laws, with a head who governs, with all sorts of offices and magistracies for administration, with courts to exercise public justice, with institutions of all kinds to provide for the intellectual and material interests of the community, with an army to express the public force—this constitution is the body of the State, it is the form in which the nation manifests its common life. Individual States differ like individual men in spirit, character, and form. The progress of mankind depends essentially on the emulation of its component peoples and states.

(*b*) It has members with various special functions.

The constitution is likewise the articulation of the body politic. Every office and every political assembly is a particular member with its own proper functions. An office is not like part of a machine, it has not to exert merely mechanical activities which always remain the same, like the wheels and spindles in a factory, which always do the same thing in the same way. Its functions have a *spiritual* character, and vary on particular occasions according to the needs of public life, which they have to satisfy: they serve life, and are themselves living. Where an office becomes lifeless, sinks into unthinking formalism, and becomes like a machine, there the office itself is ruined, and the State, by becoming a machine, inevitably falls.

(The spirit of office.)

Not only the official, but the office itself has a psychical significance, it is animated by a soul. An office has a character and a spirit which in its turn influences the person who acts in it. Even a very ordinary man when elected to the Roman consulship had his character elevated and his natural vigour increased by the dignity, majesty, and power of his office. The office of judge is so sacred, so consecrated to justice, that even a weakling when appointed to it has his mind ennobled and his determination aroused to maintain the right. The spirit of the office cannot indeed alter the nature of the official, it is not powerful enough so

to permeate the character that the individual always fully represents the significance of his office; yet every official experiences some psychical influence on his spirit and disposition, and if he has an impressionable mind it cannot escape him that his office itself has a soul which, for the present, is in a close and immediate connection with his own individuality, but which is different from him, and more enduring.

(c) It develops and grows.

Nations and States have a development and a growth of their own. The periods of national and political history are to be measured by great eras which far surpass the age of individual men; the latter may be measured by years and tens of years, the former extend beyond centuries. Every period again has its special character, and the collective history of a nation and state is a coherent whole. The childhood of nations has a different character from their maturity, and every statesman is compelled to consider the time of life in which his State happens to be. 'There is a time for everything.'

Yet is no mere natural growth.

Along with this affinity to the development of natural organism there is an important difference. The life of plants, animals, and men grows and decays in regular periods and stages, but the development of States and political institutions is not always as regular. The influence of human free will or of external fate frequently produces considerable deviations, checking, hastening, sometimes reversing the normal movement, according as it is broken in upon by great and strong individuals, or by the wild passions of the nation itself. These deviations are indeed neither so numerous, nor are they commonly so important as to invalidate the general rule. On the contrary, they are much rarer and generally much slighter than is fancied by those whose opinions are determined by the immediate impressions of contemporary events. Yet they are weighty enough to show that the idea of a mere natural growth of the State is one-sided and unsatisfactory, and that we must allow full play even here to the free action of individuals.

6. The State is a moral and spiritual organism.

Whilst history explains the organic nature of the State, we learn from it at the same time that the State does not stand on the same grade with the lower organisms of plants and animals, but is of a higher kind; we learn that it is a moral and spiritual organism, a great body which is capable of taking up into itself the feelings and thoughts of the nation, of uttering them in laws, and realising them in acts; we are informed of moral qualities and of the character of each State. History ascribes to the State a personality which, having spirit and body, possesses and manifests a will of its own.

The glory and honour of the State have always elevated the heart of its sons, and animated them to sacrifices. For freedom and independence, for the rights of the State, the noblest and best have in all times and in all nations expended their goods and their lives. To extend the reputation and the power of the State, to further its welfare and its happiness, has universally been regarded as one of the most honourable duties of gifted men. The joys and sorrows of the State have always been shared by all its citizens. The whole great idea of Fatherland and love of country would be inconceivable if the State did not possess this high moral and personal character.

The State has a personality.

The recognition of the personality of the State is thus not less indispensable for Public Law (*Statsrecht*) than for International Law (*Völkerrecht*).

A person in the juridical sense is a being to whom we can ascribe a legal will (*Rechtswille*), who can acquire, create and possess rights. In the realm of public law this conception is as significant as in the realm of private law. The State is *par excellence* a person in the sense of public law (*öffentlich-rechtliche Person*). The purpose of the whole constitution is to enable the person of the State to express and realise its will (*Statswille*), which is different from the individual wills of all individuals, and different from the sum of them.

The personality of the State is, however, only recognised

by free people, and only in the civilised nation-state has it attained to full efficacy. In the earlier stages of politics only the prince is prominent; he alone is a person, and the State is merely the realm of his personal rule.

7. The State is masculine.

The same is true with regard to the masculine character of the modern State. This becomes first apparent in contrast with the feminine character of the Church. A religious community may have all the other characteristics of a political community, yet she does not wish to be a State, and is not a State, just because she does not consciously rule herself like a man, and act freely in her external life, but wishes only to serve God and perform her religious duties. To put together the result of this historical consideration, the general conception of the State may be determined as follows:—the State is a combination or association (*Gesammtheit*) of men, in the form of government and governed, on a definite territory, united together into a moral organised masculine personality; or, more shortly—the State is the politically organised national person of a definite country.

Different names for the State.

Notes.—1. It is not without interest to observe how different peoples have named the State. The Greeks still signified city and state by the same word, πόλις—a sign that their conception of the State was based on the city, and was limited by the city point of view. The Roman expression, *civitas*, refers likewise to the citizenship of a city as the nucleus of the State, but has more of a personal character than the Greek word, and is better adapted to take up into itself greater masses of people. It speaks too for the high significance of the State, that the expression 'civilisation' is derived from the name of the State, and practically coincides with the extension and realisation of the State.

In a certain way the other Roman name, *res publica*, stands still higher, in so far as it contains not merely a reference to the citizenship of a city, but to a people (*res populi*), and a regard to the people's welfare. In the sense of the ancients the expression Republic does not exclude Monarchy but does not apply to despotic governments. [Cp. *Engl.* 'Commonwealth.']

In modern languages the expression 'State' is the prevailing one, not only in the Romance but in the Teutonic languages (*stato, état, Staf*). In itself completely indifferent (it signifies originally any condition, and

at first the fuller expression *status reipublicae* was required in order to bring out a more exact reference to the State), this term in course of time has become the most universal denomination of the State, unambiguous and needing no qualification. Although 'the established,' 'what stands,' is brought into prominence, this connexion is put aside, and the word signifies not the existing arrangement and constitution of the State (*πολιτεία*), but the State which can outlive even a complete transformation of the form of government.

All other modern expressions have only limited validity; e.g. the proud word *Reich* only applies to great states under a monarchical organisation, and suggests likewise a combination of several relatively independent countries, like the Latin word *imperium* (*Fr.* and *Engl.* empire), in which at the same time there is an allusion to the imperial (*kaiserlich*) rule. More narrow is the sense of the word 'country' (*Land*), which primarily signifies the external territory of the State—(and of a state that is not broken up into separate parts), but secondarily is applied to the State itself which has this territory. This expression forms the natural counterpart to the Greek *πόλις*, since it bases the State primarily on the country (*Landschaft*), while the other bases it on the city. The fine word 'Fatherland' is still narrower, by virtue of its relation to the individual; but at the same time it is elevated and spiritualised by the reference to the personal connexion and transmission of blood relationships in the country: in this word is expressed with clearness and with feeling the whole love and devotion of the individual citizen to the great and living whole to which he belongs with his body, with whose existence his own is bound up, and for which to sacrifice himself is the highest glory of man[1].

2. In my *Pyschological Studies on State and Church* (Zürich, 1845) the masculine character of the State has been more exactly worked out. The French expression, *L'état c'est l'homme*, does not merely signify 'the State is Man in general' (*der Mensch im Grossen*), but 'the State is the man, the husband (*der Mann*) in general,' as the Church represents the womanly nature in general, the wife (*die Frau*).

[It may be as well to note that in German the word *Stat* is masculine and the word *Kirche* feminine!]

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[1] Cp. Eurip. *Phoenissae* 369–371:

ἀλλ' ἀναγκαίως ἔχει
Πατρίδος ἐρᾶν ἅπαντας. ὃς δ' ἄλλως λέγει
Λόγοισι χαίρει, τὸν δὲ νοῦν ἐκεῖσ' ἔχει.

Schiller's *William Tell*:—

'Cleave to thy fatherland, thy country dear,
And with thy whole heart cling thou closely to it.
For rooted in thy country is thy strength;
Away in yon strange world thou stand'st alone.'

CHAPTER II.

THE HUMAN IDEA OF THE STATE. THE UNIVERSAL EMPIRE.

CAN we rest satisfied with such a conception of the State as may be arrived at from a consideration of the various actual states which have existed? The historical school is content to study the State as simply the *body* of this or that particular nation.

Philosophy requires us to go deeper. We find in human nature the tendency to, and the need for, political existence. Aristotle long ago uttered the pregnant truth, 'Man is by nature a political animal' (ἄνθρωπος φύσει πολιτικὸν ζῷον. *Pol.* i. 2, § 9). It is not any national peculiarity which makes him require the State, and capable of it, but the common nature of mankind. Further, in enquiring into the organism of different States, we discover that the same essential organs are to be found in very different nations. There is everywhere to be recognised a common human character, compared with which the special national forms are only like variations on the same theme. Finally, the conception of the nation is not fixed and determinate in itself: it points with inner necessity to the higher unity of mankind of which the nations are only members. How then could the State be based upon the nation without regard to a higher unity? and if mankind is in truth a whole, if it is animated by a common spirit, how can it avoid striving after the embodiment of its own proper essence, i. e. seeking to become a State?

The common nature of mankind implies the need of a universal State.

Merely national States have thus only a relative truth and significance. The philosopher cannot find in them the fulfilment of the highest idea of the State. To him the State is a human organism, a human person; but if so, the human spirit which lives in it must also have a human body, for spirit and body belong to one another, and between them make up the person. In a body which is not organised and human the spirit of man cannot truly live. The body politic must therefore imitate the body natural of man. The perfect State is, as it were, the visible body of Humanity. The universal State or universal Empire (*Weltreich*) is the ideal of human progress.

Man as an individual, mankind as a whole, are the original and permanent antithesis of creation. On this, in the last resort, depends the distinction between Private and Public Law. It is true the common consciousness of mankind is still confusedly dreaming: it has not yet awaked to full clearness, nor advanced to a unity of will. Mankind has therefore not yet been able to evolve its organic existence. It will take many centuries to realise the Universal State. But the longing for such an organised community of all nations has already revealed itself from time to time in the previous history of the world. Civilised Europe has already fixed her eye more firmly on this high aim.

Attempts to realise this universal State in the past.

It is true that all historical attempts to realise the universal State have, in the end, failed. It does not therefore follow that the end is unattainable. The Christian Church cherishes the hope of one day including the whole of mankind, and, though this hope has not yet been fulfilled, its fulfilment is not therefore impossible. The Christian Church cannot give up the belief that it will become universal, and human politics cannot give up the effort to organise the whole of humanity. The idea of the universal State (*Weltreich*) corresponds to the idea of the universal Church.

History itself, if studied without prejudice, points out clearly enough the way which leads to this end, and warns us at the same time against the erroneous paths into which

even political genius has strayed in attempting with the rashness of zeal to realise the universal State prematurely.

Since first a human consciousness of the State arose in Europe, each age has made the attempt in its own way.

1. The Empire of Alexander the Great.

First, Alexander the Great.—In the marriage festival of a hundred couples at Susa, Alexander gave the world a symbol of his idea[1]. He wished to wed the manly spirit of the Greeks with the feminine quickness and susceptibility of the Asiatics. The East and the West were to be united and mingled together, and from the mingling of both, as in a cup of love, the new mankind was to issue, which should find its satisfaction in the realisation of a great divine and human empire. The culture of the following centuries was at all events determined by Alexander in this way, and the Greek seeds of civilisation grew luxuriantly in the new soil of Asia. But this first brilliant attempt to establish a world-state did not endure, and was hopelessly wrecked with the death of Alexander. This was not merely due to the sad fate which snatched away the founder of the new universal state in the bloom of his youth, before he had established uniform institutions and taken care for the future. The mingling of diverse elements was unnatural, the leading idea itself was not clear.

Political ideas were confused by the mixture: the free human view which the Greeks took of the State could not be united with the religious regard of the Persians for a divine kingdom. The Macedonian monarchy could not at

[1] 'Accepto deinde imperio regem se terrarum omnium ac mundi appellari jussit.' Justin, xii. 16.

Laurent, *Hist. du droit des gens*, ii. 5, 262: ['Une barrière qui paraissait insurmontable séparait les Grecs des étrangers. Alexandre s'éleva le premier au-dessus des préjugés de sa nation. Supérieur au philosophe, son maître, qui lui conseillait de traiter les Hellènes comme des amis et les Barbares comme des brutes, il conçut la pensée de les unir, en abolissant toute différence entre les vainqueurs et les vaincus . . . Il épousa la fille de Darius et maria ses amis avec les Persanes les plus illustres: la cérémonie se fit à la manière orientale. On célébra, par une fête magnifique, les noces de tous les Macédoniens qui avaient épousé des Asiatiques: leurs noms, inscrits sur les registres, se montaient à plus de dix mille.']

the same time be an Asiatic theocracy. The Orientals willingly believed that Alexander was the son of the most high God; the Europeans were disgusted by his pretensions to divine honours.

And races were confused. Hellenic science and culture freed the Oriental world from the limitations of its religious and political bonds; but their effect was rather to break up the old than to create a new world. The deification of a man drove out reverence for the old gods: European civilisation became dissolute luxury, and helped to complete the degeneracy of the East.

2. The Roman Empire.

The attempt of the Romans to attain a universal dominion had a more enduring result. The Roman Empire was a universal empire. The whole Roman people felt itself called to extend its idea of the State over the earth, and to subject all the nations to the Roman supremacy. The manly power and iron force of the Roman character overcame the numerous peoples who dared to oppose Rome's victorious career, and already the Roman State with its legal institution as strong as rock had been built upon firm foundations in three continents. The greatest of the Romans, Julius Cæsar, left to posterity the imperial idea (*Kaiseridee*) as an inheritance, and in it he has founded an authority which transcends national limits and embraces the world.

Even the effort of the Romans has been judged at the bar of universal history. It was not, like that of Alexander, based upon a mixture of peoples, but upon the higher nature of one people which sought to stamp its national character upon mankind, to Romanise the world. That was its crime. No people is great enough to include mankind, and to stifle other peoples in its embrace. The Roman universal State was wrecked by the resistance of the Teutons in the freshness of their youth. It could not conquer the Germans; and after centuries of struggle, it succumbed to them.

3. The Holy Roman Empire.

The idea of the universal State has since then never shone with such splendour on the political horizon, but has never altogether set. The middle ages, with their com-

bination of Romance and Teutonic elements, again attempted in their way to realise it, first in the Frankish monarchy and secondly in the Roman-German Empire—on a more modest scale it is true, but not without having made important progress in the knowledge of truth. There was no longer to be one supreme and absolute dominion ruling equally the whole life of the community. Christianity had in the meantime revealed the great opposition between State and Church, so full of consequences for mankind. The State gave up the claim to rule conscience by its laws; it recognised that beside it there was a religious community with its own principle of life, and likewise a visible body different from itself, and essentially independent. This was a limit preventing it from exercising omnipotent sway. It was compelled to hand over religious life to the guidance of the Church. It never indeed attained to full clearness with regard to its relation to the Church, but the freedom of religious belief and the reverence for God were saved from the arbitrary will of the temporal ruler. The authority of Christianity depended not on him.

Further, the Christian universal empire was no longer to devour and annihilate the various nations, but to assure to all of them peace and justice. The mediæval Roman emperor was not absolute lord over all nations, but the just protector of their rights and freedom. The imperial idea was thus purified and became the inspiration of a statesman like Frederick II[2] and of a thinker like Dante[3]. The mediæval empire embraced a great number of essentially independent States, united indeed in a common order and formally subject to the Emperor, but independent in all

[2] Frederici Constit. Regni Siculi, i. 30: 'Oportet Caesarem fore justitiae patrem et filium, dominum et ministrum; patrem et dominum in edendo justitiam et editam conservando: sic et in venerando justitiam sit filius et in ipsius copiam ministrando minister.'

[3] His work, *De Monarchia*, glorifies the empire; and in his *Divine Comedy* he reverences the Emperor as the head of the divine ordering of the world. Cp. Wegele, *Dante's Leben und Werke*, Jena, 1852.

essential matters, and living in their own way. Even the diversity of peoples and races found favour and protection. But what in itself was an advance in the development of the Universal State led to its dissolution, because pursued in a too one-sided manner. The tendency to separation was stronger than the impulse to unity. The difference of nationalities, the opposition of languages separated France and Germany and tore into two parts the Frankish universal monarchy. The slender powers of the German king and Roman emperor could not oppose the rise of princes and local lords. The central institution had no central basis, and so the centrifugal forces were too strong for it, and the empire went to pieces; the attempt failed again, but left important lessons to succeeding generations.

4. The Empire of Napoleon I.

In the present century the Emperor Napoleon I again attempted to revive the idea which for a time had been neglected. He avoided the error of the middle ages, and took precautions for a strong and active central power, but he did not retain the true advances of the middle ages with sufficient care. He paid too little regard to foreign nationalities, and thus went back on the course which the Romans had previously adopted, although acting with more moderation than they. He wished to organise Europe as a vast international State, with individual States as its members. The imperial power was to belong to the French nation, which was to take the place of head in the great family of nations. He hoped to attain in one generation what the Romans had taken centuries to do. His plan failed. Not this time because of the resistance of the German people. They submitted reluctantly to the French supremacy; but despairing of their own old empire, and discontented with the circumstances of their fatherland, they appeared to submit to Napoleon's arrangements. Only the two great German States, aspiring Prussia and Austria with its complexity of countries and peoples, the former anxious about its very existence, the latter feeling itself an imperial State, sought in repeated wars to resist the supremacy of France;

but they too were conquered by superior statesmen and generals. But Napoleon failed to overcome the resistance of the English, in whom a great and historical national sentiment was united with Teutonic ideas of freedom: and the still half barbarian Russians withdrew to their steppes, defeated but not subdued. The French did not hold out in misfortune when united Europe turned upon them. Thus the Napoleonic idea failed of fulfilment like the Roman before it, and for similar reasons. The remaining nations felt themselves threatened by the universal monarchy without being assured or contented by the new government of the world, and the French nation was not powerful enough to keep them permanently subject.

Tendencies towards a common organisation of humanity.

Meanwhile unconquerable time itself works on unceasingly, bringing the nations nearer to one another, and awakening the universal consciousness of the community of mankind; and this is the natural preparation for a common organisation of the world. It is no mere matter of accident that modern discoveries and numerous new means of communication altogether serve this end, that the whole science of modern times follows this impulse and belongs in the first place to humanity, and only in a subordinate way to particular peoples, while a number of hindrances and barriers that lay between nations are disappearing. Even at the present day all Europe feels every disturbance in any particular State as an evil in which she has to suffer, and what happens at her extremest limits immediately awakens universal interest. The spirit of Europe already turns its regards to the circuit of the globe, and the Aryan race feels itself called to manage the world.

We have not yet got so far: at the present day it is not so much will and power that are wanting as spiritual maturity. The members of the European family of nations know their superiority over other nations well enough, but they have not yet come to a clear understanding among themselves and about themselves. A definite result is not possible until the enlightening word of knowledge has been

uttered about this and about the nature of humanity, and until the nations are ready to hear it.

Till then, the universal empire will be an idea after which many strive, which none can fulfil. But as an idea of the future the general theory of the State cannot overlook it. Only in the universal empire will the true human State be revealed, and in it international law will attain a higher form and an assured existence. To the universal empire the particular states are related, as the nations to humanity. Particular states are members of the universal empire and attain in it their completion and their full satisfaction. The purpose of the universal State is not to break up particular states and oppress nations, but better to secure the peace of the former and the freedom of the latter. The highest conception of the State—which however has not yet been realised—is thus: The State is humanity organised, but humanity as masculine, not as feminine: the State is the man.

(1) Objections of Vinet.

Notes.—1. A man of genius and a lover of truth, the Vaudois Vinet (in *L'Individualisme et le Socialisme*) objected to the idea of the Universal State, that it would absorb all the life of humanity, do away with the principle of individual liberty, and exercise an improper temporal rule over conscience and knowledge. This objection compels us to limit this idea more exactly.

Answers to these objections.

First of all, it must be recognized, that the State is not the *sole* human community, is not the only form in which humanity embodies itself. The Church, as visible and on earth, is also a community and an embodiment of humanity. This however is a recognition that the political rule of the State does not determine the religious life of man, nor endanger the freedom of conscience and the faith of the individual.

Secondly, it in no way follows from the human character of the State, that the State has a *complete* dominion over the individual. In every single man may be distinguished two natures, the one individual, the other common to humanity. The individual with his life does not belong exclusively nor altogether either to the community with other individuals or to the earth, nor therefore to the State as a community of life upon earth. The State is based upon human nature, not in so far as this is variously manifested in millions of individuals, but in so far as the common nature of humanity appears in one being, and the authority of the State does not therefore extend further than is

required by the common interests and the association of mankind. The State itself, when it wrongly trespasses on the domain of individual freedom, is not able to enforce its rule, for it cannot chain the individual spirit, it cannot kill the individual soul.

2. Quite lately Laurent also has declared himself against the idea of the Universal State (*Histoire du droit des gens*, i. p. 39 ff.). His reasons are as follows:— (2) Objections of Laurent.

(*a*) The world-state would be universal monarchy, and this would be incompatible with the sovereignty of states.

(*b*) There is a difference between individuals as natural and nations as artificial persons. The former are defective and are moved by bad passions; the latter are perfect and moral beings. That the former may live together, there is needed the incessant activity of the power of the State; that the latter may live together, this is not needed, or only exceptionally.

(*c*) The individual is weak, and must submit to the power of the State. States are strong, and therefore will not yield to a higher power.

(*d*) If the Universal State were powerful enough to force the States against their will, this superiority would oppress justice and freedom; for where resistance is impossible, freedom cannot exist.

(*e*) For the development of the individual the national State is necessary, but it is sufficient. The world-state is not required for the welfare of individuals, and would be dangerous to the development of nations.

These reasons of my honoured friend have not convinced me: I should answer them as follows:— Answers to these objections.

(*a*) The Universal State may be thought of with a monarchical head (empire, *Kaiserthum*) but also as republic, whether a directory (I am thinking of the European pentarchy) or a confederation or union of States. In no case need we think of the universal government having absolute power, and the continued existence of national States makes a distinction of spheres (*Competenzen*) necessary. There is no reason for extending the sphere of the latter beyond the common affairs of the world, e.g. maintaining the peace of the world, protecting its commerce, and especially what we consider the province of international law. We may find a model in the form of a federal State (*Bundesstat*), or a federal empire (*Bundesreich*), in which common federal matters are cared for by a common legislature, administration, and judicature, while in matters affecting each country the sovereignty of particular States is still recognised.

(*b*) Nations have their defects and their passions like individuals, and if there were no international law, those which are weak and helpless would be an easy prey to the strong and ambitious. The basis of international law is also the basis of the Universal State.

(*c*) The strength of national States, even as against a universal empire, is the best guarantee that the former will not be oppressed by the latter; but the greatest national State is not strong enough, if it is in the wrong, to engage alone in a struggle with the world. War will only be possible if groups of States or parties oppose one another. In all other cases war will become the execution of the judicial sentences of the universal tribunals. The best political arrangements cannot completely ensure us against civil war, and we must be content if a stronger organisation of international law makes war between States rarer. Justice never attains its ideal, but in the best cases approximates to it.

(*d*) The universal empire would be in every way less powerful in comparison with national States than a national State in comparison with its citizens. And yet the freedom of the citizens is not threatened but protected by the organisation of the State.

(*e*) The State does not satisfy all individual needs. There are cosmopolitan interests both spiritual and material (the science, literature, art and trade of the world) which can only find a complete satisfaction in a universal empire. The history of Europe and America shows us how little in our days the rights of entire peoples are secured.

Laurent bases international law on the unity of the human race, and no other basis can be found for it; but he recognises this unity only as an internal one. In my opinion logic and psychology both require that this internal power should manifest itself outwardly. If mankind is internally one being, in its complete development it must reveal itself as one person. The organisation of humanity is the Universal State.

I know that the most of my contemporaries regard this idea as a dream; but that cannot keep me from expressing and defending my conviction. Later generations, perhaps centuries hence will finally decide the question.

CHAPTER III.

HISTORY OF THE DEVELOPMENT OF IDEA OF THE STATE.

I. The Ancient World.

A. *The Hellenic idea of the State.*

Political science does not properly begin till we come to the Greeks. As it was in Greece that the self-consciousness of man first unfolded itself in art and philosophy, so it was in politics.

The political ideas of the Greeks.

Small as was the territory, and limited as was the power of the Greek State, the principles upon which the Greek political conceptions were based were broad and comprehensive, and the political idea expressed by Greek thinkers is lofty and noble. They base the State upon human nature, and hold that only in the State can man attain his perfection and find true satisfaction. The State is for them the moral order of the world in which human nature fulfils its end.

Plato.

Plato (*Rep.* v. p. 462) utters the great saying: 'The best State is that which approaches most nearly to the condition of the individual. If a part of the body suffers, the whole body feels the hurt and sympathises altogether with the part affected.' In this he has already recognised the organic and even the human-organic nature of the State, although without following out in its consequences this pregnant thought.

The State, according to Plato, is the highest revelation of human virtue, the harmonious manifestation of the powers of the human soul, humanity perfected. As the soul of man consists of a rational, a spirited, and a desiring element, and as reason and spirit ought to rule the desires, so in the Platonic ideal, the wise ought to rule, the brave warriors should protect the community, and the classes which are occupied with material acquisition and bodily work should obey the two higher orders. In the body politic justice requires that each part should do its own work. (*Rep.* iv. pp. 428–33.)

Aristotle.

Aristotle, for whose political philosophy our admiration rises, the more we consider the works of his successors, is less guided by imagination than Plato, examines reality more carefully and recognises more acutely the needs of man. Plato cuts off from family life the ruling classes of the philosophers and the guardians in order that they may live completely for the State, and demands for them a community of wives and property. Aristotle, on the contrary, wishes to maintain the great institutions of marriage, the family and private property. He declares the State to be 'the association of clans and village-communities in a complete and self-sufficing life[1].' He says that 'man is by nature a political animal' and he considers the State as a product of human nature. 'The State comes into being for the sake of mere life, but exists (or continues to exist) for the sake of the good life[2].'

In this idea (or ideal) of the State are combined and mingled all the efforts of the Greeks in religion and in law, in morals and social life, in art and science, in the acquisition and management of wealth, in trade and industry. The individual requires the State to give him a legal existence: apart from the State he has neither safety nor

[1] Arist. *Pol.* iii. 9. § 14, 1280 b. 40: *πόλις δὲ ἡ γενῶν καὶ κωμῶν κοινωνία ζωῆς τελείας καὶ αὐτάρκους.* Cp. iii. 1. § 12, 1275 b. 20.

[2] Arist. *Pol.* i. 2. § 8, 1252 b. 30: *ἡ πόλις . . . γινομένη μὲν οὖν τοῦ ζῆν ἕνεκεν, οὖσα δὲ τοῦ εὖ ζῆν.*

freedom. The barbarian is a natural enemy, and conquered enemies become slaves, who are excluded from the political community, and are therefore thrust down into a degraded and ignoble position.

Defects of the Greek idea of the State. Too much power was ascribed to it.

The Hellenic State, like the ancient State in general, because it was considered all-powerful, actually possessed too much power. It was all in all. The citizen was nothing, except as a member of the State. His whole existence depended on and was subject to the State. The Athenians indeed possessed and exercised intellectual freedom, but that was only because the Athenian State valued freedom in general highly, not because it recognised the rights of man. This same freest of states allowed Socrates to be executed, and thought it was justified in doing so. The independence of the family, home-life, education, even conjugal fidelity, were in no way secure from State interference; still less of course the private property of the citizens. The State meddled in everything, and knew neither moral nor legal limits to its power. It disposed of the bodies, and even of the talents of its members. It compelled men to accept office as well as to render military service. The individual must first be dead in the State before he could, by means of the State, be born again to a free and noble life. The absolute power of the State, apart from the influence of ancient customs, had almost no other limits than the following: In the first place, the citizens themselves had a share in the exercise of this power, and lest the despotism of the *demos* might become injurious to themselves also, they avoided the extreme consequences of political communism. In the second place, insignificant matters only supplied small material for their passions to work upon, and they were compelled to pay regard to their neighbours. The Greek States were moreover only composed of fragments of the Hellenic people and sub-races of them. They did not rise much beyond mere city-communes (*Stadtgemeinde*). The lofty idea had thus only a humble form; although referring to

Limitations to this absolute power.

mankind, it could only obtain a childish expression in the narrow limits of a mountain valley or a tract of sea-shore.

The ideal omnipotence and actual impotence of the State are thus closely connected; they are the two chief defects of the Hellenic conception of the State, which is in other respects most worthy, true to human nature, and fruitful in results.

B. *The Roman idea of the State.*

The Romans had a greater genius for Law and Politics than any other people of classical antiquity, and this more by their moral character than by their intellect. They had therefore a greater influence on the world than the Greeks.

Influence of the Greeks.

At first sight the Roman idea of the State is closely connected with the Greek. Cicero, in his political writings, has Athenian models constantly before his eyes. The Roman jurists, when explaining law and the State in general, follow the Greek philosophers, especially the Stoics.

Cicero declares the State to be the highest product of human power (*virtus*), and says that there is nothing in which human excellence comes nearer the will of the gods than in the founding and maintenance of States[3]. Occasionally he too compares the State to the individual, and the head of the State to the spirit which rules the body[4].

Differences from the Greek idea.

But in some essential particulars the Roman conception of the State is different from the Greek idea.

(1) Law distinguished from morality.

The Romans first distinguished law from morality, and gave it a definite form, and thus they brought out more distinctly the legal nature (*Rechtsnatur*) of the State. Thereby they limited the State, and gave it greater firm-

[3] Cicero, *de Rep.* i. 7: 'Neque est ulla res, in qua propius ad Deorum numen virtus accedat humana, quam civitates aut condere novas aut conservare jam conditas.'

[4] Cicero, *de Rep.* iii. 25: 'Sic regum, sic imperatorum, sic magistratuum, sic patrum, sic populorum imperia civibus sociisque praesunt, ut corporibus animus.'

ness and power. It no longer summed up for them the ethical ordering of the world, but was primarily a common legal organisation (*gemeinsame Rechtsordnung*). The Romans left very much to social customs and to the religious nature of man. The Rôman family was more free as against the State. Private property and private rights were in general better protected against the arbitrary exercise even of public authority. Of course they too made the welfare of the State the highest law (*salus populi suprema lex*). They arranged even the worship of the gods from a political point of view. No one could resist the State if it uttered its will. But the Roman State limited itself; it restricted the province of its own power and its own action.

(2) The conception of the People (or Nation).

Further, the Romans recognised the conception of the People, and brought the constitution into an organic connexion with the People. They declared the State to be the People organised, and declared the will of the People to be the source of all law[5]. The Roman State was thus not a mere commune (*Gemeinde*), it raised itself to a national State (*res publica*).

(3) Tendency to Universal Empire.

Besides, the Roman State was destined to embrace the world. Through all Roman history runs this tendency to universal dominion; the national *jus civile* was supplemented by the *jus gentium*. The eternal city, the *urbs*, became the capital of the world, *orbis*. The *imperium* of the Roman magistrate became *imperium mundi*, the Roman senate became a senate of all peoples and their kings. The majesty of the Roman People culminated in the majesty of the imperial power. The history of Rome, according to the proud expression of Florus[a], became the history of mankind. This effort gave the Roman idea of the State

[5] Cicero, *de Rep.* i. 25: 'Est igitur, inquit (Scipio) Africanus, res publica *res populi*; populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis *juris consensu et utilitatis communione* sociatus.' i. 26: 'Civitas est *constitutio populi*.' Gaius, *Inst.* i. § 1: 'Nam quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est, vocaturque jus civile.'

[a] [Florus Prooem. 'Non unius populi sed generis humani facta.']

an impetus which left the Greek States far behind, and a greatness before which they were compelled to bow. It was not an illusion but a reality which ruled the ancient world, and which only the Germans in the West and the Persians in the East had the courage and the strength to resist.

CHAPTER IV.

II. The Middle Age.

The two new forces which partly transformed and partly destroyed the universal empire of Rome were Christianity and the Teutonic race.

A. *Christianity.*

Attitude of the Early Church to the State.

The Christian religion extended its power over the minds of men, denying alike the authority of the Jewish State and the Roman Empire. Its founder was not a prince of this world. The ancient State persecuted him and his disciples to the death. If the first Christians were not directly hostile to the State, they cared for other things than political organisation and political interests. When the Christian world made its peace with the old Graeco-Roman State the religious community—the 'Church'—was already conscious of her peculiar spiritual existence, and did not regard herself as a mere State institution. The new idea prevailed that the whole religious life of the community, although not altogether withdrawn from the care and influence of the State, was yet essentially independent. The prominently marked dualism of Church and State became an essential limitation of the State, which was now only a community of law and politics, no longer also of religion and worship.

The Papacy.

When the Church had received in the Pope a visible head independent of the Emperor, and Rome for her

capital, the old Roman idea of universal dominion reappeared in a spiritual form. Although, even at the height of her mediæval reputation, the Church did not succeed in abasing the State into a mere ecclesiastical institution, and setting up one universal spiritual dominion of Rome; yet the idea of the State was for a long time far outshone by her splendour. She could compare herself with the sun, and the State with the moon, and as the ruler over men's souls claimed precedence over the ruler of their bodies. But the dualism of State and Church continued to be recognised, and thus in the main point the independence of the State was saved. The sword of the Emperor, as well as that of the Pope, was derived from God, the supreme and true ruler of the world[1].

Pope and Emperor.

As far as the teaching of the Church prevailed, the idea of the State again, as formerly in the East, received a religious foundation; the power of the State was derived from God (*Gotteslehen*), but at the same time the spiritual significance of the State was overlooked and misunderstood; all spiritual life was to come from the Church, and the State being regarded as merely bodily was put in an inferior position. The elevation of the idea of the State above the narrow limits of nationality was an insufficient compensation. Not humanity, but Christendom was to be organised and governed by it in outward things. The Roman empire was so far renewed in mediæval forms, but was represented in a superior form by the Roman Church, and in an inferior by the holy Roman Empire of the German people.

B. *The Teutons.*

The power of the Teutons.

The old Roman universal empire could not permanently maintain itself against the Teutonic races. These warlike

[1] Hincmari *de Ordine Palatii*, 5: 'Duo sunt, quibus principaliter—mundus hic regitur: auctoritas sacra Pontificum et Regalis potestas.' Sachsenspiegel, i. 1: 'Tvei svert lit got in ertrike to bescermene de kristenheit. Deme pavese is gesat dat geistlike, deme kaisere dat wertlike' (God has given two swords for the government of Christendom: to the pope the spiritual, to the emperor the temporal).

tribes forcibly wrested one province after another from Roman rule; or it happened that the Roman provincials or the emperors themselves called in to their aid the arms of Teutonic princes, who thus in a peaceable manner acquired territorial sovereignty (*Landeshoheit*). During the middle ages the Teutons ruled everywhere in the West. They came under the Christian instruction of the Roman Church and the influence of Roman civilisation; but they maintained themselves upon the thrones of princes, and in the fortresses of the aristocracy. The sceptre and the sword were in their hands.

The Teutonic Character.

The Teutons are not, like the Romans, an eminently political people; it is with reluctance that the individual submits to the sovereignty of the whole body. Their strong, confident and self-willed individuality interferes with the common consciousness, and checks its power. (Thus the Teuton stood in need of the political discipline of the Roman.) But in spite of this the development of the State in the world's history owes much to them. Above all the Teutons broke the absolutism of the Roman State, and they have won a place in all modern political institutions for the freedom of persons, associations, and 'Estates' (*Stände*). Montesquieu said very truly, that the germs of parliamentary constitutions are to be found in the forests of Germany. In the primitive forms described by Tacitus[a], in which the Teutonic kings cooperated with the local princes and other chiefs on the one side, and with the great community of freemen on the other, we recognise clearly the rude beginnings of the free representative government, which later centuries produced.

The idea of individual rights.

The Teuton does not derive law, at least not directly, from the will of the nation: he claims for himself an inborn right which the State must protect, but which it does not create, and for which he is ready to fight against the whole world, even against the authority of his own government. He rejects strenuously the old idea that the State is all in

[a] [Tac. *Germ.* c. 11.]

all. The whole relation is reversed. To the Teuton individual freedom is the supreme thing. He is induced to sacrifice a part of it to the State in order to keep the rest all the more securely.

It is a necessary consequence of this character, that the Teutonic idea of the State respects the independence of private rights more decidedly than the Roman. The freedom of the person, the family, the association is thus more assured and more extended than in the old Roman empire. The rights of the State are thus limited by the rights of the individual as well as by those of the Church.

'Particularism' in politics.

A further consequence for Public Law is that the Teutons in general admit no absolute power of the State, even in matters affecting the community. The Roman conception of *imperium* is foreign to them. Before obeying they wish to deliberate and vote. Their estates (*Stände*) are a political power with which that of the king must be united in order to make laws. Yet the idea of the State as a collective person is still, as a rule, unintelligible to them. They tend rather to break up the State into actual persons or groups of persons. They understand it primarily as embodied in the king or other princes, who are at the head of the courts of justice, and of the assembly of the people, in the chief of the hundred (*Gau*), the tithing (*Zent*), and the township (*Volksgemeinde*). One set of persons sometimes strengthens and sometimes limits another; thus the whole organisation of the community, even in its parts, is filled with the spirit of freedom. Unity is relatively weak, but the independence of the parts is strong.

Surviving tradition from antiquity.

These alterations of the idea of the State in which we recognise considerable advance showed themselves rather in practice than in theory. The Teutons had no political philosophy of their own. Science in the middle ages was at first in the hands of the Church, and was afterwards determined by the traditions of Roman jurisprudence and Greek philosophy. Even in the old tribal laws are to be found reminiscences of this sort: e.g. in the laws of the

Visigoths, after the model of classical literature, the body politic is compared with a man, the king with the head, and the people with the members of the body[2]. But this was only a borrowed rhetorical ornament without deeper significance, and with no definite reference to the actual mediæval State.

In some other respects the idea of the State suffered degradation, and that not merely because it was disparaged by the Church.

The mediæval State might be called a legal State (*Rechtsstat*), but in a different sense from that of the Romans. It was not the organisation of Public Law only: all its institutions were interfused with elements of Private Law. Territorial sovereignty was regarded as the hereditary property of a family, and public duties were treated as burdens upon land. The whole feudal law and the patrimonial State in all its aspects suffer from this admixture. Roman Public Law only served as a starting-point. The feudal law of the middle ages appeared to be the essential end of the mediæval State, and the welfare of the people was neglected for it. Feudal Law.

The idea of the national State had perished, destroyed by the breaking up of the national and political unity, by the feudal system, by the conflicting claims of territories, estates, and dynasties. What remained of the Roman empire was rather an ideal international, than a political, union of Western Christendom, and this union was held together more by the authority of the Pope and the Roman clergy than by the Empire.

On the whole the seeds of a freer and better development of the State had been sown, but the idea of the State

[2] *Lex Visigothorum*, ii. 1. § 4: 'Bene Deus conditor rerum disponens humani corporis formam, in sublime caput erexit, atque ex illo cunctas membrorum fibras exoriri decrevit. Hinc est et peritorum medicorum praecipua cura, ut ante capiti quam membris incipiant adhibere medelam. Sicque in Statu et negotiis plebium ordinatio dirigenda, ut dum salus competens prospicitur Regum, fida valentibus teneatur salvatio populorum.'

had in the middle ages become less precise and vigorous than among the Romans.

C. *The influence of the Renaissance.*

The Roman Church kept alive the ideas of the Roman Empire.

Even during the middle ages the memory of the ancient State had never been completely lost. Rome had remained the spiritual capital of the West. The old Roman Empire had indeed been broken to pieces by the Teutons, but the Teutons who had formed independent kingdoms out of Roman provinces received their civilisation, and, above all, their religion from Rome, and in the place of the fallen city the Roman Church became the ruling power of the middle ages, to which the Teutons themselves in time submitted. In the institutions, method, morals, law and language of the Roman Church, a great, nay the chief, part of the old Roman State was preserved. The old Empire was transformed into the new Papacy, the universal State into the universal Church, in order to rule the nations more easily. The old Roman Emperor had exercised his sway by his representatives and officials with the help of Roman law, in the name of the Roman people, and enforced it by the power of his legions; similarly the Roman Pope commanded reverence in the name of God and the Church by means of his bishops, and with the help of canon law and ecclesiastical discipline, and enforced his decrees by means of the numerous monastic orders.

The Holy Roman Empire.

But alongside of the Church the memory of the old Empire still remained. We know nowadays how totally unlike was the Roman Empire of the Frankish kings from Charles the Great and of the German kings from Otto the Great to the old Roman Empire, which had had its seat in Rome and in Constantinople. But the whole middle ages believed that the one was only a continuation of the other, and that the Frankish Emperor, or the Roman Emperor of the German people, was the regular successor of Claudius, Antoninus, and Constantine. In any case the

renewed dignity of the Emperors implied a reminiscence of the old Roman Empire, and an ideal union of mediæval ideas and institutions with the ancient world.

Roman Law.

To this must now be added the rediscovery of the old imperial code, the *Corpus Juris Romani*, which from the twelfth century had been expounded at the Italian universities, and was revered as a revelation of all human law. From Italy its authority spread victoriously over all Western Europe, from the thirteenth century in France, and with still greater consequences from the fifteenth century in Germany. However the learned jurists were thinking rather of private law, and perhaps of criminal law, than of public law. But many fundamental views about the State, about its legislation, and about its sovereignty which had been expressed by the Romans, became in this way part of the ordinary ideas of the learned class.

Republican traditions.

Recollections of the old Roman republic and its majesty sometimes revived and animated the citizens of towns in their effort to found new city republics. The very names of the civic magistrates in Italy and in Germany implied a dim memory of the consuls of the Roman Republic. Twice over in the middle ages the Roman populace in romantic enthusiasm attempted to reawaken and reanimate the long dead republic; once in the twelfth century under the leadership of Arnold of Brescia, and a second time in the fourteenth century under the tribune Cola Rienzi. Both attempts failed through the political incapacity of the mediæval Romans, but both testify to the power of the ancient tradition.

Greek theories.

Even Greek political theories were not quite unknown to the Romance civilisation of the middle ages. The *Politics* of Aristotle were studied in many monasteries, and that most famous theologian, Thomas of Aquino, wrote a commentary on the celebrated work of the Greek philosopher.

Nevertheless the legal system, and still more the political organisation of the middle ages, were totally different from those of antiquity. The institutions of the time were

moulded mainly under Teutonic influences, and its ideas dominated by the theology of the Church.

The Renaissance.

In the second half of the fifteenth century the recollection of the classical period awoke more vigorously, and the classical spirit of the Greeks and the Romans was born again (the '*Renaissance*'). The works of ancient art produced a liberating and elevating effect on the Italian artists, in architecture, sculpture, painting, and poetry. The ideas of ancient science were again held in honour, and broke through the bounds set by mediæval scholasticism and monastic theology. Humanism rose above the ecclesiastical contempt of the world, and a brighter and more joyous way of looking at life found wide acceptance at courts and in cities. As nearly 2000 years before the Sophists became the teachers of young Greeks of good family, so now the Humanists became the chosen instructors of ambitious youth in Italy, France, and Germany. Educated men were no longer terrified by the reproach that from Christians they were again becoming Pagans. Even the Popes put themselves at the head of this intellectual movement. Nicolas V (1447–1455), Pius II (Aeneas Sylvius, 1458–1464), Julius II (1503–1513), Leo X (1513–1521), protected and encouraged the artistic freedom of the Renaissance. The princely Medici, especially Cosimo (1434–1464) and Lorenzo (1469–1492), made Florence an Italian Athens.

Influence of the Classical Revival.

The ancient conception of the State and ancient political theories likewise reappeared in part and influenced public affairs, especially in the following ways: (1) A few bold thinkers dared to explain the rise of States and the nature of political authority by human considerations, and thus to oppose theocratic opinions.

(2) Secondly, the idea of *policy*, consciously and calmly considering means and ends for the guidance of the State and the government of nations, became decisive in political practice and theory, and received its clearest expression in the writings of Machiavelli (1469–1527). His *Discourses on Livy*, in which he glorifies the Roman republic, and his

Prince, in which he points out the way to the ambition of rulers, are filled with the political spirit of the Renaissance.

(3) Thirdly, we mark the renewal of a political *Imperium* and a political Sovereignty before whose single authority everything else must bow. In the hands of the prince who ruled the State, this authority, freed from the limitations of feudalism and of the mediæval 'estates,' grew to an absolutism like that of the Roman Emperor.

(4) Finally, the Renaissance manifested itself also in an opposite form, to which this growing tyranny incited. With the recollection of the Cæsars there awoke also the memory of Brutus; tyrannicide was praised as republican virtue, and even 'Catilinarian' conspirators reappear[3].

But all this revival of ancient political ideas and tendencies was limited to a comparatively narrow circle of highly educated men. The masses had no understanding and no capacity for it. The whole influence of the Renaissance on politics was only partial, and quickly passed by, helping to break up the mediæval, and to prepare the way for the modern State, but bringing forth no new political organisation of its own.

[3] Burckhardt, *Die Renaissance*, p. 44 ff. [Engl. Tr. I. p. 81.]

CHAPTER V.

III. The Modern Idea of the State.

A. *When does the Modern Epoch commence?*

The historical consciousness of Europeans and Americans at the present day is unanimous in accepting the idea of a period of many centuries in the life of humanity which is called 'the middle ages'; and in believing that we are living in a new age. But opinions are still divided as to what point of time separates the modern from the mediæval period. We have learned that the past is bound up with the future. Presentiments and tendencies of the coming age make themselves felt long before, and countless effects of bygone days continue to operate in changed times. In the depth of the middle ages a few distinguished men gave utterance to ideas which have not been understood until the present century, and even to-day we still find many survivals of mediæval institutions carefully preserved, and that not merely in monasteries or the castles of the nobility. The old and the new are linked together by the very unity of human life, and it shows a want of sense to sever them sharply from one another. It is the same with the different ages in the life of the individual. Nevertheless it is necessary to determine the different periods of time which, though passing over into one another, may yet on the whole be clearly distinguished.

Many date the beginning of the new age as far back as

the second half of the fifteenth century. The period of the Renaissance appears to them the transition from the middle ages to the modern world. The reawakening of the philosophical spirit after the slumber of more than a thousand years, the revival of ancient ideas and memories in opposition to mediæval beliefs and institutions, the reappearance of a freer and more joyous art under the influence of classical models, above all the rise of the Italian cities which did not shrink from withdrawing themselves as occasion offered from the protection of the Papal hierarchy, the extension of Roman and the disparagement of Canon law, the invention of printing and the diffusion of printed books, the invention of gunpowder and the consequent changes in warfare, the greater enterprise in navigation, and the discovery of unknown countries on the coasts of Africa and in India and of a whole new continent in the West—all this certainly marks a transition from the old to the new. But it is not so much the conclusion as the decline of the mediæval period, and the preparation for the rising tendencies of the new era. The spirit of the age (*Zeitgeist*) at the Renaissance had rather the character of maturity than of youth or childhood. It was less inclined to create what was new than to revive what was old; its efforts were directed throughout to the revival of ancient ideas and the imitation of ancient models. It partly reformed and partly destroyed the institutions of the middle ages, but it did not overthrow them nor replace them by creations of its own. The movement ended by stiffening into the absolutism of princes, great and small.

1. The Renaissance?

Still more often the period of the ecclesiastical Reformation is considered the beginning of the new period—not indeed the incomplete attempts at reform in the German Empire at the Diet of Worms of 1495, but the reform of the sixteenth century, which is usually dated from the 13th October, 1517, when Martin Luther nailed his theses to the church door of Wittenberg.

2. The Reformation?

As a matter of fact the world-historical breach with the

mediæval authority of the Roman Church was then complete, and the foundation of Protestant churches was actually a new creation in the ecclesiastical sphere. The liberation of the religious conscience from servitude to Rome undoubtedly gave a powerful impulse to the subsequent liberation of science from all ecclesiastical authority. The moral purification and elevation of the idea of the State prepared the way for modern politics.

Nevertheless the fundamental idea of the German Reformation was not the production of anything new, but the purging of the ancient Church from long-standing abuses, and the restoration of the primitive purity of Christianity. The old historical authority of the Papal Church and its tradition was broken, but the still older and equally historical authority of the Holy Scriptures was retained with greater strictness than before. It was indeed as impossible for the Church reformers to restore primitive Christianity as it was for the Italian masters to reproduce the classical art of Athens and Rome. The world had changed and old ideas could only reappear in new forms. The life of Europe was still advancing, and the Protestant Church, as well as the State which was influenced by Protestantism, were thus relatively new phenomena. But the idea of the State itself remained essentially that of the middle ages. The State was still the kingdom of this world and of the body, the Church was still mainly the spiritual community of the saints preparing for heaven.

A decisive proof that the Reformation of the sixteenth century belongs rather to the advancing age of the mediæval period than to the youthful efforts of the modern era is to be found in the character of the two centuries from 1540 to 1740. This long period gives the impartial observer the impression, not of youth but of old age. Even in the Protestant Church a dead and rigid orthodoxy straightway regained the upper hand, allowing no fresh movements, and fettering and repressing the advance of science. In the Catholic Church we mark the growing influence of the

Jesuits, the most pronounced supporters of the artificially maintained mediæval hierarchy. The absolute monarchy dominated over the mediæval nobility and broke up the feudal system, but there was no new blood in the veins of this despotic system which prevailed over the whole continent of Europe, and was repulsed in England alone. It was supported mainly by old ideas, dynastic and Roman, patrimonial and theocratic. The *rococo* style, which gradually supplanted that of the Renaissance, is a manifestation of senility. Everywhere there is rather breaking up and decay of the mediæval period than a fundamentally new era. The young Leibnitz received so vivid an impression of this that he wrote in 1669, 'We may well believe that the world has entered on its old age[1].'

3. The English Revolution?

The same considerations prevent us from finding the beginning of the modern period in the English Revolution, whether that of 1640 or the so-called "glorious" Revolution of 1688. Certainly they brought about something new—constitutional monarchy. But the more carefully we compare the English with the French Revolution, the more is our conviction strengthened that the former belongs to the end of the Mediæval and the latter to the Modern period. The English were struggling mainly for the old Anglo-Saxon liberties and for the traditional rights of Parliament against the absolutism of the king, whereas the French strove to realise a new and rational organisation of the State and a new social freedom.

4. The French Revolution?

Many therefore see in the French Revolution the first decided movement of the modern period, and date this from 1789, an opinion which flatters French vanity. It is incontestable that the French Revolution was filled and animated by the modern spirit, but it had begun to work before this. The "age of enlightenment" (*Aufklärung*) which preceded had already the unmistakable stamp of the new time.

5. 1740? [The accession of

Among many others, Thomas Buckle, the learned historian of modern civilisation, has remarked that in the year 1740 a

[1] Pichler, *Theologie von Leibnitz*, i. p. 23.

Frederick the Great of Prussia.

change in the current of men's ideas becomes perceptible. As the sun first lights up the mountain-tops, and only afterwards shines down into the valley, so the new spirit first manifests itself in great men, and only gradually diffuses itself among the multitude. In the second half of the eighteenth century the new spirit animated not only a chosen few, the prophets and forerunners of a coming age: everywhere new ideas rose on the horizon, and the demand for change was universally felt. Men's hearts swelled with the hope of a new life. Art, literature, the state, and society were transformed, the sentiments of the world were turned away decisively from the middle ages towards a new creation.

If we compare men and events since 1740 with those of the preceding centuries, we are struck by the vast change in the character of the times. Not merely are the individuals different, but the conditions of their existence, the ground on which they stand, the air which they breathe. Compare, e. g., Frederick the Great of Prussia, the most significant representative of the modern State and the modern view of life—not merely with Louis XIV of France, the clearest representative of the absolute monarchy by the grace of God, which closes the middle ages—but even with his own great ancestor, the Elector Frederick William; or compare the liberation of the Netherlands from Spanish rule with the liberation of North America from English rule; or compare the French with the English Revolution, or Rousseau with Ulrich von Hutten, or Lessing with Luther, and the vast difference is at once apparent.

The newness of the period on which civilized mankind has entered since the middle of last century, appears in the uncertain probing and experimenting of political theory and practice, in the daring attempts at a complete new creation, in the momentary despair which succeeds failure, in the oscillations between revolution and reaction. If the modern era has on the whole the character of self-conscious manhood, in a higher degree than any previous period of history, these

traits, which we have noticed, show that we have only experienced the first stage of this manhood, and that it has still an immature and youthful, sometimes even childish appearance, just as the last centuries of the middle ages have a senile aspect. The organic and psychological law of growth does not only govern the entire life of humanity: it repeats itself in recurring circles in particular periods within the various ages of the world.

Thus we date the modern era from the year 1740. The rise of the Prussian kingdom, Joseph II's reforms in Austria, the foundation of the United States of North America, the changes of the French Revolution and the Napoleonic empire, the transplanting of constitutional monarchy to the continent, the attempted introduction of representative democracy, the foundation of national states, the gradual removal of religious privileges and disabilities in public law, the separation of Church and State, or at least the clear demarcation between their spheres, the abolition of feudalism and of all privileged orders, the rise of the conception of national unity, the recognition of the freedom of society,—all these are the achievements or at least the attempts of the modern State.

Note. We are accustomed to consider the history of the human race in its inner connection, and in a regular order. We therefore distinguish the different ages of the world, in the same way that we distinguish the ages of the individual's life. We speak of a childhood and of a youth of mankind, and we consider the latter to end with the classical period of Greek and Roman civilisation. In the same way we separate the middle ages from the youthful and brilliant era of the old Greeks and Romans, and on the other side from the more mature and manly modern world.

Whilst the life of the individual is measured by years and decades, the life of humanity has to be reckoned by hundreds or thousands of years. Within particular eras we sometimes discover the same cycle, and the same succession of ages, and find first ascending and then descending stages. Just as great eras of the world's history have a definite character and spirit, so it is with the periods and phases which we find within them. Thus, the first and second halves of the eighteenth

century belong to thoroughly different types, and so too the first and second halves of the sixteenth century.

The unity of history implies the unity of mankind.

This whole manner of contemplating the history of the world is however only valid on the presupposition that humanity is not merely a sum of individuals, and its life not a mere sum of individual lives. It depends on the assumption that humanity is a whole, and has a development of its own, which requires for its movement and advance greater periods of time than those of the individual life. In viewing whole periods of hundreds and thousands of years, we cannot but be impressed by this mighty continuity, this fixed order of development, and we infer therefrom the unity of the human race, and the destiny of humanity whose great life advances regardless of the little lives of individuals, which consciously or unconsciously contribute to it.

The duration of the human race.

If this view is correct, we are led to ask what is the duration of that humanity whose life is described by universal history. It is not probable that the unknown or little known infancy of mankind should stretch back immeasurably, whilst its youth and advancing maturity does not exceed a few thousands of years. There must be some proportion. Yet this presumption seems to be contradicted by the natural science of the present day.

The Semitic account of the creation reduces the age of the earth to a few thousands of years. A more profound examination has vastly extended it, and we have learnt to count by millions, or even by milliards of years. The same researches have put the beginnings of the human race further back to a time which it is difficult to determine exactly, and the remoteness of which is immeasurably more vast than any known periods of later history. It is at least very probable, if not certain, that hundreds of thousands of years ago there were beings like men. Natural History has discovered remains of primitive human bones and sculls, which must have belonged to the same unknown pre-historic age as the cavern bears. Even the connection and the transitional stages which link the human body with the older forms of animal life have been pointed out. It has been made probable that the pre-historic man was more nearly related to apes and other animals, than his present representatives. This at first sight appears to increase our difficulties, but on further examination affords a solution of them.

The history of man's creation may go back to far earlier times than the traditional view suspects, but there is no reason for extending the history of civilisation, and what we call universal history, as far back.

History begins with the white man.

History could not begin until a higher race showed the capacity of themselves working creatively at the perfection of mankind. It begins therefore with the appearance of the white races, the children of light, who are the bearers of the history of the world. The white man cannot be so old as the anthropoid ape.

The law of the organic and psychological development of universal history, must not be confused with the natural law of bodily descent. The common feeling and the common spirit of humanity, the progressive and changing forms of sentiment and thought which are manifested in the works of man, belong essentially to his higher nature, and not to that of the animals.

The first appearances of inferior human races may be regarded as the material cause [ὕλη] of the higher forms of humanity, but bear only the same relation to his proper history that the pigments and brushes do to the work of the artist.

CHAPTER VI.

B. *Chief differences of the Modern Conception of the State from the Ancient and Mediæval.*

These may be exhibited as follows:—

Differences between the Ancient and Modern State regarding: Rights of man as man.

ANCIENT STATE.	MODERN STATE.
1. The ancient State did not recognise the personal rights of man, nor consequently the right of individual freedom. In all ancient States at least a half of the population consisted of slaves without rights, and only the smaller half of free citizens. Agriculture, and the rearing of cattle, manufactures, household service, even trade in great measure were chiefly looked after by slaves. Consequently labour was little esteemed, and the labourer of little account. The slaves were only connected with the State through their masters. They had no share in the State: they had no fatherland. The rights of man were almost altogether denied them. Custom was indeed often better than the law, but even at the best their actual situation was	1. The modern State recognises the rights of man in every one. Everywhere slavery has been abolished as a wrong. Even the milder form of serfdom and hereditary subjection has been set aside as inconsistent with the natural freedom of the person. Man has no property in man, for man is not a thing, but always a person, i. e. a subject of rights (*Rechtswesen*). Labour is free and esteemed. All classes of the people have a political position in the State, and the suffrage has been extended, even to labourers and servants. The danger of slave revolts has disappeared. The whole State rests on a broader basis, its roots extend through the whole population.

uncertain, and might suddenly change to the worst. From time to time servile revolts broke out, and were cruelly suppressed.

2. The ancient idea of the State embraced the entire life of men in community, in religion and law, morals and art, culture and science. The priesthood was a political office. The ancient State did not yet recognise the full spiritual freedom of the individual.

2. The modern State has become conscious of the limits of its power, and its rights. It considers itself essentially a legal and political community. It gives up its claim to dominate religion and worship, and leaves both to churches and individuals. The priesthood is an ecclesiastical office. The modern State claims no scientific and no artistic authority, it esteems and protects freedom of scientific enquiry and of expression of opinion. Sphere of State-action.

3. Man had only full rights, *qua* citizen. Among the Greeks private and public law were not yet distinguished. The Romans separated them in principle, but their private law still remained completely dependent on the will of the people and the State. Individual freedom as against the State was not yet recognised.

3. Man has his rights as an individual, private law is sharply distinguished from public law, and is rather recognised than created by the State, rather protected than commanded. The free person is not absorbed in the State, but develops himself independently, and exercises his rights, not according to the will of the sovereign State, but according to his own. Individual freedom—Private Law.

4. The sovereignty of the State was absolute.

4. The sovereignty of the State is constitutionally limited. Sovereignty.

5. Public authority was directly exercised by its holders. In the ancient republic the citizens appeared in great popular assemblies (*ἐκκλησίαι, co-*

5. The modern State is representative. In place of these mass assemblies comes a representative body chosen by the citizens. These represen- Direct Government—Representative Government.

militia, &c.), and decided directly on important public affairs.

tative bodies have more capacity than the ancient popular assemblies to examine laws, to decide and exercise control.

The city—The nation.

6. The Greek States were essentially city States (πόλεις). Rome expanded from a city State to a world State.

6. Modern States are essentially national States. The city is only a community in the State, and not the heart of the State.

Differentiation of functions.

7. In the ancient State public activities were distinguished by their nature and objects, but usually the same assemblies and magistrates exercised different functions, legislative and administrative, *imperium* and *jurisdictio*.

7. In the modern State different activities have different organs, and thus the earlier distinctions in the objects of authority have passed into a personal separation of functions.

International relations.

8. The ancient State felt itself limited externally only by the resistance of other States, and not by a common international law. Rome pursued without scruple the dominion of the world as her natural privilege.

8. Modern States recognise international law (*Völkerrecht*) as a limit to their dominion. International law protects the existence and freedom of all nations and States, and rejects the universal dominion of one State over all peoples.

Differences between the Mediæval and the Modern State regarding:

The chief differences between the Modern and Mediæval State are as follows:—

	MEDIÆVAL STATE.	MODERN STATE.
Divine—human origin.	1. The middle ages derived the State and the authority of the State from God. The State was held to be an organisation willed and created by God.	1. The modern State is founded by human means on human nature. The State is an organisation of common life formed and administered by men, and for human ends.
Theology—Science.	2. The conception of the State was based on and regulated by theological principles. Islam, which belonged altogether to the middle ages, recognised only a kingdom of	2. The fundamental principles of the State are determined by the human sciences of philosophy and history. Modern political science starts from the consideration of man

God, which was entrusted by God to the Sultan. Mediæval Christianity avowed the dualism of Church and State, but believed that both swords, the spiritual and the temporal, were entrusted by God, the one to the Pope, and the other to the Emperor. Protestant theology rejected the idea of the spiritual sword, and recognised only the one sword of the State, but held firmly to the religious idea that sovereign power comes from God.

in explaining the State. Some consider the State to be a society of individuals who have united together for the defence of their safety and freedom; others as an embodiment of the nation in its unity. The modern idea of the State is not religious, but not therefore irreligious, i. e. it does not make the State depend upon religious belief, but it does not deny that God has made human nature, and that His providence has a part in the government of the world. Modern political science does not profess to comprehend the ways of God, but endeavours to understand the State as a human institution.

3. The ideal of the mediæval State was not indeed like that of the old oriental peoples, a direct theocracy, but an indirect theocracy. The ruler was the vice-gerent of God.

3. All theocracy is repellent to the political consciousness of modern nations. The modern State is a human constitutional arrangement. The authority of the State is conditioned by public law, and its politics aim at the welfare of the nation (the commonweal), understood by human reason, and carried out by human means. Theocracy.

4. The mediæval State depended upon community of belief, and demanded unity of creed. Unbelievers and heretics had no political rights, they were persecuted and exterminated; at the best they were merely tolerated.

4. The modern State does not consider religion a condition of legal status (*Recht*). Public and private law are independent of creed. The modern State protects freedom of belief, and unites peacefully different churches and religious Religion.

societies. It abstains from all persecution of dissenters or unbelievers.

The Church.

5. Mediæval Christendom considered the Church as spiritual, and therefore higher; the State as bodily, and therefore lower. Thus the rule, or at least the guardianship, of the priesthood was above that of kings. The clergy stood high above the laity, and enjoyed immunities and privileges.

5. The modern State regards itself as a person, consisting at once of spirit (the national spirit) and body (the constitution). It feels itself independent, even as against the Church, which is likewise a collective person, consisting of spirit and body, and maintains its supremacy even over the Church. It recognises no superior status in the clergy, abolishes their privileges and immunities, and extends the authority of law over all classes equally.

Education.

6. In the middle ages the Church guided the education of the young, and exercised authority over science.

6. The modern State leaves only religious education to the Church, the school is a State school, science is free from ecclesiastical authority, and its freedom is protected by the State.

Public and Private Law.

7. Public and private law were not distinguished, territorial sovereignty was held to resemble property in land, and the royal power a family right.

7. Public and private law are distinguished, and public rights imply public duties.

Particularism—Centralisation.

8. The middle ages produced the feudal system. The power of the State was split up, and there was a gradual descent from God to the king, from him to the princes, then to the knights and the towns. The organisation of law was particularistic.

8. The modern State is an organisation of the nation (*Volk*) and preserves a central unity in its authority. States are formed on a national (*national*) basis, and tend to become great in size. Law is national and human, and applies to all equally.

Representation.

9. Representation was ac-

9. The modern State re-

cording to estates. The aristocratic estates of the clergy and the nobility dominated. Law was different in each estate.

10. Great and small lords had the freedom of their dynasties and orders so extensively protected, that the authority of the State was weakened. On the other hand the peasantry were kept in an unfree condition.

11. The mediæval State was merely a legal State (*Rechtsstat*); but the administration of justice was indifferently guarded, and people were often left to maintain their own rights. Government and administration were weak and little developed.

12. The mediæval State had little consciousness of its own spirit. It was determined by instincts and tendencies. It gives one the impression of natural growth; custom was the chief source of its law.

quires a uniform representation of the people. The great classes of the people have the chief power: the basis is democratic. Citizenship embraces all classes equally. The law is the same for the whole country and people.

10. The modern State develops the common freedom of citizenship in all classes, and compels every one to submit to its authority. Liberties—Liberty.

11. The modern State, because constitutional, is likewise a legal State; but at the same time it concerns itself with economics and culture, and above all with politics. Government is strong, and administration is carefully developed with a view to the welfare of the nation, and of society. Sphere of State-action.

12. The modern State is conscious of itself, it acts according to principles and from reason rather than from instinct. Legislation is the principal source of its law Unconscious custom—conscious legislation.

CHAPTER VII.

THE DEVELOPMENT OF DIFFERENT THEORIES OF THE STATE.

POLITICAL science has had a very important share in altering the actual character of the State and the ideal of what it should be[1]. Modern political theory preceded modern political practice, and has generally accompanied and pointed out the way for change. More rarely, theory has followed facts.

The following are the main phases in the scientific development :—

1. At the Renaissance.

The conception of the State at the time of the Renaissance, especially as we find it in the works of Machiavelli, Bodin, and partly also of Hugo Grotius, is the direct outcome of the ancient conception, but begins to deviate from it.

Machiavelli.

The State is to Machiavelli the highest kind of existence. He reverences it as the noblest production of the human spirit. He loves it passionately, and sacrifices to it without hesitation everything, even religion and virtue. But his State is no longer a legal or constitutional State, such as was that of the ancient Romans. Public law is to him only a means to further the welfare of the State, and to secure the growth of its power. His ideal is exclusively filled and determined by politics. The State is for him neither a moral

[1] For more details see Bluntschli's *Geschichte des allgemeinen Statsrechts und der Politik*. München, 1854: Dritte Auflage, 1881.

nor a legal (*Rechtswesen*), but only a political being. Thus, the only standard of all state-acts is utility. What the power and authority of the State demand, that must the statesman do, undisturbed by moral and legal considerations. What is hurtful to the welfare of the State he must avoid.

Machiavelli's great service was to make political science independent of theology, and to have discovered the distinction between public law (*Statsrecht*) and politics (*Politik*). But he has adorned an immoral and unjust policy, has put his prudent advice at the disposal of tyranny, and has thus helped to corrupt the political practice of the last three centuries.

Bodin. Bodin sees in the State 'a right government, with sovereign power, of several households and their common possessions[2].' He bases the State especially on the family, common possessions, and sovereignty, and he blames the political ideas of the ancients for having looked too much to happiness and success. By his doctrine of the sovereignty of the ruler he gave a scientific support to the absolutism of the French monarchy.

Grotius. Hugo Grotius still inclines to the definitions of Cicero, but the transition to modern political ideas may be quite clearly observed. He bases the State, like the ancients, upon human nature, but he is thinking less than they of mankind or of a whole people. He looks, above all, to the individual man. His saying '*hominis proprium sociale*' is a bad translation of the Aristotelian: ὁ ἄνθρωπος ζῷον πολιτικόν. But it shows in a characteristic way that the modern mind does not begin with the State, but with the individual. The sharp separation of the religious community of the Church from the worldly and political community of the State, and the strong accentuation of personal freedom are two other signs of the modern spirit of the Dutch writer. He declares the State to be 'the complete union of free men, who join themselves together for the purpose of enjoying law, and for

[2] Bodin, *De la République*, i. 1.

the sake of public welfare[3].' The personality of the State was not unknown to him, but it does not dominate his political theory, and in making the consent of men the chief source of public law he suggests a line of thought which was carried out in the later theory of contract.

a. Theories of the law of nature, of contract, and association.

The idea of contract formed the basis of the modern theory of the Law of Nature, and the speculative political philosophy which was founded on it in complete independence of ancient theories of the State. The differences of philosophical schools and of political parties produced a great difference between opinions, hardly any one writer completely agreeing with another. But even into the present century, in the many accounts of the Law of Nature, and of the general conception of the State, there prevailed the fundamental idea that the State was essentially an association of individuals, and therefore an arbitrary work of individual freedom. The absolutist, Hobbes[4], who makes the authority of the monarch an all-devouring Leviathan, is in this at one with the radical Rousseau[5], whose 'sovereignty of the people' makes the continuance of the whole order of the State an open question. The ingenious Samuel Puffendorf[6] regards the State as a moral person, but its will is, for him too, only composed of the individual wills of all, and he explains the State by the theory of social

[3] Hugo Grotius, *De jure belli, etc.*, i. 1. § 14: 'Est civitas coetus perfectus liberorum hominum, juris fruendi et communis utilitatis causa sociatus.' i. 3. § 7; Prolegom. § 16. Cp. Leo, *Weltgeschichte*, iv. p. 149.

[4] Hobbes, *De Cive*, c. 5. § 9. Molesworth's Edit. Vol. II. p. 214: 'Civitas ergo est persona una (?), cujus voluntas *ex pactis plurium hominum* pro voluntate habenda est *ipsorum hominum*; ut singulorum viribus et facultatibus uti possit ad pacem et defensionem communem.'

[5] Rousseau, *Contrat social*, I. Ch. 6: 'Trouver une forme d'association qui défende et protège de toute la force commune la personne et les biens de chaque associé, et par laquelle chacun, s'unissant à tous, n'obéisse pourtant qu'à lui-même et reste aussi libre qu'auparavant: tel est le problème fondamental dont le *Contrat social* donne la solution.'

[6] *De jure naturali et gent.*, vii. 2, 13: 'Unde civitatis haec commodissima videtur definitio, quod sit persona moralis composita, cujus voluntas ex plurium pactis implicita et unita pro voluntate omnium habetur, ut singulorum viribus et facultatibus ad pacem et securitatem communem uti possit.'

contract. John Locke zealously defends this theory against the attacks of theological bigots, and finds in it a guarantee of English civic liberty. Even Kant[7] does not get beyond it, although he shows a tendency to do so, and Fichte himself in his earlier writings still adheres to the same view.

The State, according to the whole philosophy of natural rights, is essentially based upon contract and upon association. If the ancient philosophers did not sufficiently regard the rights of individuals, the modern have committed the opposite error of regarding the individual so much as to ignore the significance of the State as a whole.

3. System of authority.

It was only in the modern period that the theory of natural law could obtain general acceptance, and lead to attempts to realise it. The absolutist character of the two centuries before 1740 implied a theory of the State, which based it upon the power of a superior. The source of this conception received no further examination. Sometimes people were content with the traditional belief of the Church, that the government had received the sword from God: sometimes they inclined to the patrimonial tradition that the prince was the supreme owner of the country. Meanwhile these older doctrines had to undergo a transformation, partly through the accentuation of the 'public law' (*öffentlich-rechtlich*) character of sovereignty, partly through the necessary regard to the public weal.

The State was thus regarded as being essentially the sphere of the power of a superior, and the government was actually identified with the State (*l'état c'est moi*, as Louis XIV said). This was the fundamental idea of the absolutist theory of the State which, prepared by Bodin and Hobbes, was developed in a theological way, especially by Filmer and Bossuet, and was taught with a hundred variations. In this one-sided view of authority, the rights and liberty of

[7] *Werke*, vii. 197 (Ed. Rosenkranz): 'A union of many for some end is to be found in all social contracts, but a union which is in itself an end is only to be found in a society, so far as it constitutes a collective being (*gemeinsames Wesen*).'

the governed were of course altogether left out of sight. Just as the Roman Catholic Church places the essence of its being in the clergy alone, with the Pope at their head, while the laity are regarded as a flock of sheep, who have to be guided and sheared by their spiritual shepherd; so, according to this theory of the State, only the prince and the government officials had any value, and the subjects were looked on as a mere passive mass, to be managed and governed from above, but with no claim to manage themselves, or to share the government, or to control the conduct of their rulers.

4. The State as a 'legal State.'

It was with the immediate intention of narrowing the sphere assigned to government, alike by the theory of natural law and by the theory of authority, that Kant and Wilhelm von Humboldt declared the State to be a 'legal State' (*Rechtsstat*) in the sense that its sole duty was the maintenance of the legal security of each individual. Fichte indeed broke through these narrow limits in describing the State, as at the same time concerned with economics, and in this respect he even exaggerated its power, and towards the end of his life, inspired by the national enthusiasm for the liberation of Germany, he ascribed to the State still higher spiritual functions. But most German philosophers and jurists of the next generation still adhered to the theory in the narrow Kantian sense.

The idea obtained acceptance with many who sought a defence against the mania of the time for over-government, and against the arbitrariness of the police and the military.

Legal State *versus* Police State.

But those who opposed the legal State to the 'police State' (*Polizeistat*), and who declared it to be the work of modern times, to replace the latter by the former, were without a clear consciousness of all that the State implied. The State must not be made a mere legal State, any more than it can be a mere 'police State.' In the former case the State would at last become a mere institution for administering justice, in which the legislative power would establish the legal rules, and the judicial power would protect them

and apply them to particular cases, and the government would have almost no other activity left it than that of a servant of the law courts, a policeman[a]. Economic interests, culture, and the development of the national power would be neglected, and there could be no greatness in the policy of the country. On the other hand, a one-sided development of the 'police State' would in the end sacrifice all individual rights and freedom to an exclusive regard for that which appears useful to the whole, and would subject free men to an intolerable amount of protection.

In what sense the State is and is not a 'legal State.'

If then by 'legal State' is understood (1) that the State is *only* an institution for protecting the rights of individuals, all public law is clearly turned into a mere means for private law, and the State sinks to the position of a mere servant of private persons.

Further, if by 'legal State' is understood (2) that the State has to organise the rights of the community, and at the same time to care for the recognition of individual rights, this is a quite correct but an insufficient view, since just the most important activity of the statesman, care for the material well-being and the spiritual elevation of the people, is overlooked.

Or (3) if it is understood that the State has practically to further the public welfare, but can formally only exercise compulsion in so far as this is required by some definite legal rights, this is true enough, but at the same time it is clear that only one side of political activity is thereby determined, and that no account is taken of public care, e. g. for the needs of food-supply, trade, and civilisation generally,

[a] [Cp. Book V. ch. iii. below. It will be obvious that Bluntschli's 'legal State' implies what has in England been called 'Administrative Nihilism' (by Professor Huxley, criticising Mr. Herbert Spencer), or 'Anarchy *plus* the policeman'—the very opposite therefore of what Bluntschli calls 'Police State,' which implies what has been nicknamed 'grandmotherly legislation.' It should be observed that some more recent German writers have used the term *Rechtsstat* simply in the sense of a constitutional government, a government in which the administration does not transgress the law—whatever that may be. See Holzendorff, *Principien der Politik* (2nd edit.), pp. 213, 214.]

all of which move freely within those legal limits, and need no formal compulsion.

If by legal State is understood (4) the denial of the religious basis of the State, and the affirmation of its human basis and limits; or (5) the resistance to all absolute authority, to the patrimonial State—too often allied with arbitrary police interference—and the assertion that the citizens must have a share in public affairs, the characteristics of the modern State are indeed indicated, but the expression is unfortunate. It is better to call it a 'constitutional State.'

The State must pay regard to public welfare as well as to Law.

The State has two aspects: rest and movement, continuance and progress, body and spirit. There are two political sciences corresponding to this internal distinction, Public Law and Politics; and so too there are two great principles which, like two stars, illuminate and fructify the life of the State, conditioning both its form and content: justice (*justitia*) and the public weal (*salus publica*). Statesmen have especially the latter before them, jurists the former. The idea of justice determines public law, the idea of welfare guides politics.

The care of government relates rather to the public welfare, although within the limits of law. The Romans, the political people *par excellence*, assigned to their highest magistrates the care for the public weal as their supreme duty [8]. The activity of the law courts is limited to the maintenance of the law. But if the State is to exist and prosper, it must constantly pay regard to public welfare as well as to law. Now it is just the needs of the commonweal which are more highly regarded by the modern than by the mediæval State, and therefore the former is less of a mere legal State than the latter.

5. The historical school. Organic theory of the State.

The historical school has the merit of having restored the consciousness of the organic character of the State, of which indeed a few great statesmen had never lost a vivid compre-

[8] Cic. *de Legibus*, iii. c. 3, of the Consuls: 'Ollis salus populi suprema lex esto.'

hension. Frederick the Great of Prussia expressed it clearly in his *Anti-Machiavel*: 'As men are born, live for a time, and then die from disease or from age, so states come into being, flourish for some centuries, and then perish.' But science had so completely neglected this view that the restoration of it by the historical school had the effect of a new discovery, and science for the future took a new and more fruitful direction. Meanwhile the historical school was inclined to take up the conception of the State too much as merely national, and to overlook or even to dispute its human significance. Thus, Savigny declared the State to be 'the bodily form of the spiritual community of the nation,' or 'the organic manifestation of the nation[9].' But the brilliant Englishman, Edmund Burke, in contending against the theories of the revolution, brought the historical State into the light of the divine order of the world, in a famous passage of his *Reflections on the Revolution in France*: 'Society is indeed a contract. Subordinate contracts for objects of mere occasional interest may be dissolved at pleasure; but the State ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence; because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science, a partnership in all art, a partnership in every virtue and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of each particular State is but a clause in the great primæval contract of eternal society, linking the lower with the higher natures,

[9] Savigny, *System des röm. Rechts*, i. p. 22.

connecting the visible and invisible world, according to a fixed compact sanctioned by the inviolable oath which holds all physical and all moral natures, each in their appointed place[10].'

Such a conception of the State is far more lofty than was possible according to the mediæval doctrine that the State was related to the Church, as the body to the soul.

The historical school, however, only took up the State as it had come to be. Looking only at the past, it was so powerfully attracted by the scenes of ancient life, that many of its disciples lost understanding for the present, and inclination to help in improving public conditions. The school of natural law might frequently be reproached with making the State the sport of arbitrary individual will. Similarly the historical school may be blamed for having its conception of the State fast bound to traditional authority and hereditary prejudices[11].

6. Recent German political philosophy.

Although the works of the historical school are almost exclusively limited to the legal and political history of

[10] Edmund Burke, *Reflections on the Revolution in France* (Clarendon Press *Select Works*, edited by Payne, vol. ii. pp. 113, 114). Cp. also Leo (*Weltgeschichte*, vi. p. 759), who works out Burke's idea.

We are reminded of the noble words of Shakespeare (*Troilus and Cressida*, Act iii. Scene 3):—

'There is a mystery (with whom relation
Durst never meddle) in the soul of state;
Which hath an operation more divine
Than breath or pen can give expressure to.'

Cp. also *King Henry V*, Act i. Scene 2:—

'*Exeter*. For government, though high and low and lower,
Put into parts, doth keep in one concent,
Congreeing in a full and natural close,
Like music.

Canterbury. True: therefore doth heaven divide
The state of man in divers functions,
Setting endeavour in continual motion;
To which is fixed, as an aim or butt,
Obedience: for so work the honey-bees,
Creatures that by a rule in nature teach
The act of order to a peopled kingdom.'

[11] The historical tendency becomes a reaction, a return if possible to the middle ages, in the writings of De Maistre and Ludwig Haller.

particular states, yet even speculative philosophy gained by the new inquiries.

Even Hegel in his theory of Law (*Rechtslehre*) paid more regard to the historical formation of states than the earlier theorists of natural law. He supposed indeed that he found in the history of the world a dialectical process of reason. The 'existing' appeared to him 'rational.' His theory glorified especially the Prussian state, as it then existed, still absolute although governed in a spirit of public duty. He defended the power of the monarchy, and did not care for the advance of constitutional freedom. But he emphasised the moral significance of the State, and in opposition to the wretched idea that it was only a necessary evil, he praised it, as the highest and noblest realisation of the idea of Right. Hegel.

Hegel's State is however only a logical abstraction, not a living organism, a mere logical notion, not a person[19]. Hegel, by founding the State and Law merely upon will, overlooks the fact that in the State not merely is the collective human will operative, but all the powers of human spirit and feeling together.

Fr. J. Stahl, who, after Hegel, was the most important representative of the philosophical theory of the State in Berlin, argued against the school of natural law and the Hegelian theory with zeal and ability. He undertook to unite the historical tendency with the imaginative speculations of Schelling. Stahl.

Stahl has in many ways advanced political science by his dialectical and critical ability in finding new points of view, and by the acuteness with which he lights up many dark places; but in other respects his want of thorough historical education, and his somewhat servile sophistry, which made modern formulas subservient to the romantic

[19] Hegel, *Rechtsphilosophie*, § 257: 'The State is the realisation of the moral idea. It is the moral spirit as substantial will manifested, and clear to itself, thinking and knowing itself, and accomplishing what it knows, and in so far as it knows it.' Cp. his *Philosophy of History*, Trans. by Sibree, pp. 40–42.

fancies of great and small despots, have done much harm. Stahl considers the State as 'a moral and intellectual domain,' or as 'the union of the multitude to an ordered common existence, the setting up of a moral authority and power exalted and majestic, to which the subjects must submit.' His idea of the State is more living than Hegel's. He recognises too that the rule of the State 'is limited to common interests,' and in this way he avoids the exaggeration of the ancient State, but a trace of the theocracy of the Old Testament runs like a red line through his whole theory of the State, destroying its value for the modern European world. The divine or superhuman majesty of the power of the State can make no peace with human and civil liberty.

7. Union of the philosophical and historical methods.

The old strife between the philosophical and historical school in Germany has altogether ceased. Peace was made as early as 1840. Since then it is recognised on all sides that the experiences and phenomena of history must be illumined with the light of ideas, and that speculation is childish if it does not consider the real conditions of the nation's life. In spite of this union of the two methods, which supplement and correct one another, some authors have more of the philosophical, and others more of the historical tendency.

Criticism of the State from different points of view.

Another characteristic of modern political science is the sharper criticism which is exercised not only in examining facts, but in making abstractions from them, and in forming conceptions. This criticism considers the State from the most different points of view. A few of the most notable writers may be named. The works of Robert von Mohl are written mainly from the literary point of view, but they show a sober and intelligent application of the standard of practicability. Alexis de Tocqueville has always in view the movement of political life, whether he is describing the American democracy, or the connexion of the French Revolution with the old *régime*, or the condition of the English aristocracy. The Baron Eötvös is influenced by a distrust of modern ideas. John Stuart Mill criticises public affairs

from the radical standpoint of abstract logic, moderated however by his English temperament. Thomas Buckle applies the methods of natural science to the theory of the State, and attempts to explain the life of the State by a consideration of the forces of nature.

Historical criticism.

With other writers criticism has a decidedly historical character, e. g. Gneist, the chief authority on English constitutional history; Édouard Laboulaye, who writes admiringly of the American constitution; and Heinrich von Treitschke, who first brought out the significance of the Prussian monarchy. Lorenz von Stein follows the same method, but occupies himself chiefly with details of administration.

The Juristic method.

In the more recent school of Gerber, criticism has taken especially a juristic character. The writings of many of his pupils show the danger of this method, which tends to repress progress by formal abstractions.

The Psychological.

The psychological consideration of the State, on the other hand, attempts to explain the life of the State more profoundly from the forms and faculties of the human spirit. This method involves an opposite danger, viz. that the movement of Politics may not sufficiently regard the fixed and sure realm of Law, but disturb and transform it.

The Comparative.

The comparative method which considers the most important States alongside of one another, is in harmony with recent tendencies. Most of the writers who have been named have used it with success. It is indispensable for the general theory of the State.

National theory of the State.

Finally, in an age like ours, in which national States are formed, the theory of the State accentuates more decidedly than before the national character of the State. Welcker in Freiburg, Franz Lieber in New York, Fr. Laurent in Ghent, Bluntschli in Zürich and Munich, had followed this tendency in theory, even before the attempts of Italy and Germany to realise their national unity. The newly-awakened political science of the Italians in its youthful ardour worked out the national basis of the State with

special prominence, and at first not without one-sided passion. Its most distinguished representatives are Mancini and Padeletti in Rome, and Pierantoni in Naples. The Italians, like the Germans, unite the historical and the philosophical methods in their works.

The organic or psychological nature of the State.

Note. There is still little understanding for the organic or, to use a better expression, the psychological and human nature of the State. As there are persons, sometimes educated persons, who have no musical ear, or are completely insensible to the beauty of a painting or a drawing, so there are many learned men who are complete strangers to organic or psychological thinking. One must not blame them, for nobody can go beyond his natural dispositions, but they would do well to abstain from any judgment about things which they do not understand. Otherwise they only exhibit their presumption as well as their deficiency.

Schmitthenner.

One of the first to lead the way in the organic method was Fr. Schmitthenner, who declared the State to be 'an ethical organism for the purpose of giving a public expression to external life, law, well-being and culture.'

Vollgraff.

A remarkable attempt was made by Vollgraff to base the theory of the State on the psychology of peoples. ('*A first attempt at a scientific explanation of general ethnology by anthropology, and of the philosophy of politics and law by the ethnology or national character of peoples*,' 3 parts, 1851–53.) The work professes to be a first attempt, and as such deserves respect, but is not well adapted to bring the psychological method into repute. Neither the account of the powers of the human mind nor the estimate of the different temperaments is satisfactory, and the considerable amount of collected historical material and the numerous observations and notes of travel are so uncritical, and so much mixed up with mere fancy pictures, as not to give the impression of accuracy.

Ahrens.

Ahrens, a follower of the philosopher Krause, has undertaken to write an organic theory of the State (H. Ahrens, *Die organische Statslehre*, Bd. I, Vienna, 1850); but by the organism of the State, he does not so much understand a living and personal collective being, as an organic arrangement for community in law.

Waitz.

Waitz (*Politik*, 1862, I. 5) says: 'The State is not something arbitrarily made, it does not arise by a contract between men, nor by the power of one or more individuals. The State grows like an organism, but not according to the laws, nor for the ends of mere natural life: it has its foundation in the higher moral tendencies of man, and is a sphere for the realisation of moral ideas, it is not a natural but a moral organism. The State is the organisation of the people.' The State is

not however the realisation of the moral life in general. The moral dispositions and ideas of man determine also private life, the church, the family, and society. Only if we understand psychologically the collective human nature of peoples, and of mankind, do we get a clear and satisfactory basis for the conception of the State. In my *Psychological Studies on State and Church*, Zürich, 1844, I made the first attempt to explain the State from the point of view of the psychology of Fr. Rohmer. Bluntschli.

I made the mistake of presupposing some understanding for this science which I had made known in my *Theory of Parties*, but I found out that I was in error, and that all psychological thinking about the State was strange and unknown to the education of the day. My *Studies* were put aside as 'the incomprehensible nonsense of an otherwise intelligent man.' The fruits of these studies, as they have been matured in the present work, are received with general acceptance. Meanwhile the time has come nearer in which the path on which those studies entered will no longer appear adventurous, and the organic and psychological study of the State will be readily pursued; then people will be better able to judge, whether these studies have any value or not. Meantime I find compensation for much misunderstanding and misappreciation in knowing that the two most brilliant of German statesmen, Frederick the Great and Prince Bismarck, have proved by word and deed their understanding for the psychological life of nations and States.

BOOK II.

THE FUNDAMENTAL CONDITIONS OF THE STATE IN THE NATURE OF MEN AND OF NATIONS.

CHAPTER I.

MANKIND. THE RACES OF MEN, AND FAMILIES OF NATIONS.

MANKIND has not yet found a collective organisation in a world-empire. History in times past only knows of single empires and states limited to parts of mankind. The general theory of public law (*Statsrecht*) must therefore begin by observing those parts, and by defining the relation of nations to humanity and the State.

Mankind: its unity and differences.

A belief in the unity of the family of men is essential to the higher religious sense. Christianity has called all men to be the children of God. The civilised States assume the unity of mankind and recognise a common human nature even in lower races and tribes. But, at the same time, the diversity of races is of the highest importance for the State and for public law: for in the State men appear in an order, and order cannot be imagined without difference.

Science hitherto has failed to discover the mysterious origin of the main races (*Hauptrassen*) of mankind. Are races due to separate acts of creation? or have the different races parted gradually from one original parent race? and if so, what natural forces were at work in the change? We do not yet know. But at the very outset of the history of human development, as we know it, we find the chief races differing in mental capacity as well as in build and colour, and that diversity has remained essentially the same.

It is true that no race has remained quite pure, and large

portions of primitive races have been torn away from their kinsfolk, and some of them transformed into new nations.

Four main Races.

But throughout we can see the distinction between white, black, yellow, and perhaps red races at work in the history of development, especially if we look beyond mere colour, which is often deceptive.

There are, indeed, many thinkers who, in theory, deny the mental inequality of these races, but scarcely one who does not constantly recognise it in practical life. The whole history of the world bears witness to the different endowment of races, and even to the unequal capacity of the nations which have grown out of them.

(1) The Ethiopian Race.

It is probable that the dark Ethiopian race, the 'nations of the night,' as Carus calls them, once covered not only Africa, their special quarter of the world, but also the southern countries of Asia, and even occupied the southern promontories of the continent of Europe. There can be no doubt of the great age of this, perhaps the earliest of all races. But at no time or place has it, of itself, attained even a moderate degree of legal and political development. It has no real history. In every encounter with white races or men, it has at once given in to them. With a luxuriant fancy and excitable passions it unites a poor understanding and a weak will. Childish by nature, it is meant to be educated and ruled by higher nations.

Even in antiquity the black race in India and Egypt were ruled by the white Aryans and Semites. To the present day the old Negro monarchies of Africa are not proper States, but arbitrary and capricious despotisms. These tribes made a distinct advance when they came under the influence of Mohammedan religion and culture, especially in North Africa and the kingdoms of the middle Soudan. The attempts of the Negroes of Hayti and Liberia to imitate the governments of the French Empire and the United States are burlesques of the life of political nations.

(2) The Red Race.

On the other hand, the red races of the American Indians are less childish. But their political capacity is very small.

No doubt before the colonisation of America by Europeans there were larger States there, with a considerable and respectable civilisation. But the theocratic monarchies of Peru and Mexico were probably not the work of indigenous races, but were founded by immigrants from Eastern and Southern Asia. The name of 'White Children of the Sun' given to the Incas in Peru, and the honour paid to white men as 'sons of the Gods,' point unmistakably to an Aryan origin. Where the Indians were left to themselves, they again relapsed into the state of wild hunters, and fell into small groups. Their tribal republics with changing chiefs, impetuous orators and assemblies, rest on no firm foundation of law and institutions. They are not States, but societies of hunters. Individuals, perhaps, enjoy a self-willed and froward freedom, but the bond uniting the whole is crude and inflexible. They can offer no opposition to the advance of white civilisation, and are crushed out and destroyed by it.

(3) The Yellow Race.

The so-called 'yellow' race has more significance for political development. Their home has always been in Asia, and they part into two main tribes,—the browner type of the Malays, and the lighter type of the Finns and Mongols. The latter especially has produced great princes, commanders, and statesmen. Some, indeed, of these tribes have remained to the present day in the nomad state, as herdsmen, hunters, and robbers, chiefly in middle Asia; but other nations of this race have founded great empires. They have retained their roughness in the West, and grown more humane in the East. The race, as a whole, comes nearer to the Caucasian than either the Negroes or the Indians do, and they have from early times, especially in the upper classes, intermarried with whites. The civilised nations (*Culturvölker*) of China and Japan have reached a higher development than the Huns and Turks. They have produced a subtle political philosophy, and the ideas of humanity as opposed to barbarism, and personal merit as opposed to nobility of birth, were recognised by them earlier than by

the Aryans of Europe. They have done much for agriculture, trades, schools, and police. But their ideas of law were always mixed up with moral precepts, and limited by considerations of family life and discipline. Their government is a benevolent despotism. They have little sense of honour, and no idea of national freedom.

(*a*) The White Race,

Highest in the scale stands the white race of Caucasian or Iranian nations, the 'nations of the daylight,' as Carus calls them in opposition to the children of the night and of the twilight, the 'children of the sun and of heaven,' as the ancients called them. They are pre-eminently the nations which determine the history of the world. All the higher religions which unite man with God were first revealed among them; almost all philosophy has issued from the works of their mind. In contact with other races they have always ended by conquering them and making them their subjects. They give the impulse to all higher political development.

with its two great families: (*a*) the Semitic, (*b*) the Aryan.

To their intellect and to the energy of their will, we owe, under God, all the highest achievements of the human spirit. But these 'nations of the day' part into two great families, the Semitic and the Aryan nations. The function of the Semites in the world is, above all, a religious one. Judaism, Christianity, Islam, were all first given to the world among Semitic nations, and in the East. But politically they are less important. On the other hand, the Aryan family of nations, whose language is the richest in forms and in thought, holds the first place in the history of States and the development of rights: they have found their true home in Europe, and it is here that their manly genius for politics has unfolded and matured.

On this rests the claim of these Aryan nations of Europe to become, by their ideas and institutions, the political leaders of the other nations of the earth, and so to perfect the organisation of mankind.

These differences of Race are 'natural': those of

This diversity of races, then, is natural: it is due to nature's creative energy, and is not merely the product of human history. On the other hand, the nations into which these

races divide, or which have arisen from the fusion of different races, are clearly the product of human history. Nations are 'historical' members of humanity and its races. We do, indeed, know of primitive nations, nations, that is, which meet us in early times, of which we have scanty knowledge, or whose origin is lost in antiquity. But there are a very large number of nations whose origin falls within the domain of our historical knowledge, and we have sufficient ground for believing that the 'primitive nations' arose in the same way. History, by processes of separation and fusion, as well as by change and development, has in course of time severed nations and produced new ones. Hence the peculiarity of nations appears less in their physical appear ance than in their spirit and character, their language and their law.

Nationalities are 'historical.'

Notes.—1. Prichard in his *Natural History of Man* has treated of the differences and affinities of the chief races in physical structure and speech: while A. de Gobineau in his *Essai sur l'inégalité des races humaines*, Paris, 1852–1855, has tried to bring out political differences. Interesting and stimulating as these works are, there is still much to be done before sure scientific results are attained. The latest and most complete work is Th. Waitz, *Anthropologie der Naturvölker* (Theil vi. bearbeitet von Gerland), 1859–1872; cf. also Peschel, *Völkerkunde*, 5th ed., 1881, pp. 337 ff.

2. Science has too long neglected the important bearing of race on law and politics. Gobineau, who seeks to supply this want, often goes to the opposite extreme of explaining everything by race. He also attends too exclusively to race founded on birth and descent (*Geburtsrasse*), ignoring the fact that a race, as we see both in families and nations, may be produced by education (*anerzogene Rasse*). Such a 'secondary' race, though more dependent on human freedom, has a powerful influence on the development of rights. The Romish clergy are a striking instance of this.

The influence of individuals is distinct from that of race, and demands equal attention: individuals have determined the course of history almost more than races. The treatment of these differences by Fr. Rohmer in his *Lehre von den politischen Parteien* (dargestellt durch Theodor Rohmer, Zürich, 1844) deserves more attention than it has received.

CHAPTER II.

THE CONCEPTIONS 'PEOPLE' AND 'NATION.'

VULGAR usage confuses the expressions 'people' (*Nation*) and 'nation' (*Volk*); science must carefully distinguish them. But even scientific language is often confused by the fact that the same words are used in different senses by different civilised nations.

A People implies a civilisation, a Nation is a political idea.

In English the word 'people,' like the French '*peuple*,' implies the notion of a civilisation, which the Germans (like the old Romans in the word 'natio') express by *Nation*[a]. The political idea is expressed in English by 'Nation,' and in German by *Volk*. Etymology is in favour of German usage, for the word *natio* (from *nasci*) points to birth and race, *Volk* and *populus* rather to the public life of a State (πόλις).

Thus the Germans in the middle ages were at once a people (*Nation*) and a nation (*Volk*), while in the last few centuries they ceased to be a nation, and were rather a people divided into a number of different states, countries, and one may almost say nations. To-day the German nation (*Volk*) has come to life again, although individual parts of the German people form parts of non-German nations and states. Although in our time the sense of nationality is stronger than ever before, yet even now the ideas of 'people' and 'nation' nowhere fully coincide.

[a] [The English word 'people' has however very often the political sense of *Volk*, e.g. *Volksvertretung* = 'Representation of the people.']

Peoples and Nations are the product of history. A People comes into being by a slow psychological process, in which a mass of men gradually develope a type of life and society which differentiates them from others, and becomes the fixed inheritance of their race. Origin of a People.

A mere arbitrary combination or collection of men has never given rise to a People. Even the voluntary agreement and social contract of a number of persons cannot create one. To form a People, the experiences and fortunes of several generations must co-operate, and its permanence is never secured until a succession of families handing down its accumulated culture from generation to generation has made its characteristics hereditary.

The rise of a Nation implies merely a political process, the creation of a State, and may therefore be brought about quickly by a new constitution, but not with real safety unless built upon a basis of nationality. Origin of a Nation.

In the formation of a People many forces and factors are at work, tending to unite the masses composing it by a common spirit, common interests, and common customs, and to separate them from other masses which have become strange to them.

Religious belief acted with such power, especially in mediæval Europe, but also in ancient Asia on the whole thought and life of men, that community of religion was made the ground of nationality, and unbelievers were excluded as foreigners. The influence of (a) Religion.

Probably the Aryans of India and Persia first parted from one another for religious reasons, and certainly the Brahmanists and Buddhists, in spite of their common habitation, language and descent, fought with one another as foreign peoples, merely on the ground of their faith. And thus the Jewish people maintained their characteristics, not only in their own home, but in the Babylonian Captivity, under the Roman Empire in Alexandria and Rome, and even after the destruction of the Jewish state had dispersed them among strange states and peoples. But now that

religious freedom is valued more highly than unity of belief, this influence of religion upon the formation and separation of peoples becomes weaker. Nationality is now a stronger power to unite and to separate than religion. Germans have become conscious of their unity as a nation apart from the question whether they are Catholics or Protestants, Jews or Pantheists, and they maintain their distinction from foreign peoples, although many of these are of the same religion with them.

(*b*) Language. A stronger influence on the separation of Peoples than that of religion is difference of language. Common language is the special mark of a People. The populations of different countries gradually give to their language a new form of their own, until a time comes when those who once used the same speech cease to understand one another, because their languages have taken different ways. Henceforward those who still speak and understand the same language recognise one another as members of the same people (*'Nationale'*), while the others, whose language they no longer understand, are regarded as strangers.

Language is the expression of the common spirit and the instrument of intellectual intercourse. It is carried forward and handed down as a heritage in the family. The national language therefore keeps the sense of nationality awake and living by daily exercise. Even strange races, entering on the heritage of a new language, are gradually transformed in spirit by it until their nationality is changed. Thus the German tribes of the Ostrogoths and Lombards in Italy became Italian; the Celts, the Franks and Burgundians in France became French; the Slavs and Wends in Prussia became German.

If the feeling of nationality in our day has become more powerful and effective than ever before, it is due in the main to the influence of language, to literature, and above all the periodical press. The 'national' movement has received its chief impulse from national literature, which is the means

to community of thought and feeling, and to the common extension of intellectual possessions.

Still, language does not always decide nationality, and therefore the notions of a 'people' and hereditary community of speech are not exactly coincident. The Bretons and the Basques regard themselves as part of the French people, although they speak French as a foreign language. Here political union in one nation (*Volk*), common fortunes, interests and culture have awakened and formed the feeling of French nationality. On the other hand, English and North Americans, although they continue to speak a common language, regard one another as two nationalities, distinct, although closely related. Here it is not language, but the difference of natural circumstances and pursuits, and of historical, social and political conditions which have divided one people into two.

(*c*) Habitation, customs, political union, etc.

These instances show that, apart from (*a*) religion and (*b*) language, (*c*) community (1) of country and habitation, (2) of way of life, occupation and customs, and (3) of political union have their influence in the formation of new peoples.

Finally, the mixture of parts of different nationalities may give rise to a new type and a new character, and hence to a new nationality. European and American history abound in examples of this.

(*d*) Fusion of Races.

The essence of a People lies in its civilisation (*Cultur*): its inner cohesion and its separation from foreign peoples spring mainly from development in civilisation, and express themselves chiefly in influencing its conditions. It can only be understood from a psychological point of view; its essence is to be seen in the common spirit and common character which inspires it. It may be called an organism in so far as its character has received a visible expression in the physique of the race and in language and manners.

A People is characterised by its common spirit and common civilisation, the product of an unconscious process of growth.

But it is not, as the Nation is, an organism in the higher sense of a personality. The sense of association and the disposition to unity are there, but there is no unity of legal

will and of act, there is no legal personality unless it has become a State and a Nation.

Although the human mind and human effort have a very considerable influence in the formation of peoples, yet for the most part the process is an unconscious one.

The very fact that the one humanity parts into many peoples, enables it by means of their competition and their manifold energies to unfold all those hidden powers of its nature which are capable of common development, and to fulfil its destiny more abundantly. The growth and development of Peoples is a powerful factor in the history of the world, and certainly an essential element in its divine plan.

Definition of a People.

The conception of a 'people' (*Nation*) may be thus defined. It is a union of masses of men of different occupations and social strata in a hereditary society of common spirit, feeling and race, bound together, especially by language and customs, in a common civilisation which gives them a sense of unity and distinction from all foreigners, quite apart from the bond of the State.

The limits of a People are capable of movement and change. It may grow and spread continuously, by extending its language and manners, its civilisation, among foreign masses, and so assimilating them. It may decrease, collapse, and disappear if a foreign civilisation comes victoriously against it, and absorbs and transforms its members. In this way a great people with a higher civilisation gradually destroys the ruder civilisations of small tribes and replaces them by its own.

Definition of a Nation.

By a Nation (*Volk*) we generally understand a society of all the members of a State as united and organised in the State. The Nation comes into being with the creation of the State. It is the consciousness, more or less developed, of political connection and unity which lifts the Nation above the People. A Nation which leaves its own country may be imagined as continuing to be a Nation, but only provisionally so, until it succeeds in forming a new State in

A Nation is distinguished from a People by the sense of political unity.

a new country. Again, the Nation may precede the State, as the Jewish nation under Moses preceded the Jewish State: but here, again, it is only because the impulse to State-life is strongly developed in it, and its unity of organisation paves the way for the foundation of a State.

No State, no Nation.

So far the idea of a nation always bears a necessary relation to the State, and we may say, 'no State, no Nation.' This genesis of the State we shall consider specially in Book IV. But we do not usually give the name of Nation to a merely passive governed body of people without political rights. And therefore we cannot quite say, 'no Nation, no State.' Despotism knows nothing of Nations; only of subjects.

If a whole Nation or the main part of it belongs to one people, it is naturally pervaded by the common spirit, character, language and customs of that people. If, on the other hand, it is composed of parts of different peoples, it has less community of feelings and institutions than a People.

A Nation is a collective personality

On the other hand, the chief point which distinguishes a Nation from a People is that in it community of rights is developed in a more marked degree and is raised to the point of participation in the conduct of the State, and its capacity of expressing a common will and maintaining it by acts has acquired the proper organs in the constitution of the State: in a word, it is a collective personality, legal and political. We are justified, then, in speaking of a national spirit (*Volksgeist*) and a national will (*Volkswille*), which is something more than the mere sum of the spirit and will of the individuals composing the Nation. That spirit and will, both by its organs and content, is not individual and isolated and self-contradictory: it has all the unity of a common spirit and a public will.

with a spirit and will of its own;

subject to the changes of organic life.

Nations, moreover, are organic beings, and as such are subject to the natural laws of organic life. In the history of their development the same stages may be distinguished as in the life of individuals. The natural powers and con-

ditions of a Nation, its ideas and needs, are not the same in its old age as in its childhood. For Nations, as for individuals, the middle period of their life is, as a rule, the time of highest development for their spirit and power. Only these periods which are distinguished by decades in individual lives are to be measured in the life of nations by centuries. But nations no less than men appear to be mortal.

Notes.—1. Savigny did good service by insisting on the organic character of the nation and the influence of a nation's age on the development of law in Germany.

2. The family tie by itself does not produce a people or a nation, and *Schleiermacher's* remark, 'If a number of families are united together and excluded from others by *connubium*, national unity is the result,' is doubly contradicted by history. Both patricians and plebeians at Rome were united by *connubium*, but at first they had no *connubium* with one another, yet together they formed the Roman nation.

The Teutonic nations consisted of a union of estates, each of which was united by the tie of *connubium*. And in modern times we find intermarriage between different peoples, without giving rise to a new people.

3. Mancini (*Della Nazionalità come fondamento del Diritto delle Genti*; Turin, 1873, p. 37) defines a 'nationality' as 'una società naturale di uomini da unità di territorio, di origine di costume e di lingua conformati a comunanza di vita e di coscienza sociale.' But while he rightly regards nationality as the natural condition for the formation of a State, he does not properly distinguish nation and people—regarding a people as a legal personality, which it cannot be till it is organised as a State.

CHAPTER III.

THE RIGHTS OF NATIONALITIES.

THE fact that we have begun to demand recognition for the rights of nationalities (*nationale Rechte*) implies an advance in civilisation. Nationalities demand respect and protection as members of humanity and as the product of historical evolution. The first and most natural right which lies at the basis of all others is the right to exist. But what form of human life could have a better natural right to existence than the common spirit of a people? It is at once the substratum of individual life and an essential condition of the development of humanity. But it will take time before this merely moral imperative is embodied in the corresponding legal formula. The main significance of the principle of nationality lies so far in the region of policy, not in that of public law.

Rights which a People may assert:

But the following may be mentioned as principles which may rightly be asserted by members of the same nationality.

Language is the most peculiar possession of a people, is the strongest bond which unites its members, and the chief means by which it reveals its character. For this reason the State cannot deny a nationality (*Nation*) its language[1], nor prohibit its literature. It is, on the contrary, the duty

(1) To its own Language.

[1] *Austrian Fundamental law: On the general rights of citizens:* Dec. 21, 1867, Art. 19: 'All tribes in the nation (Volksstämme) have equal (!) rights, and each has an inviolable right to maintain its nationality and language.'

of the State to give free play to a language, and to promote its use, so far as the general interests of civilisation are not injured thereby. The suppression of the native languages of the provincials by the Romans was a fearful abuse of the power of government, and the prohibition of the Wendisch language in the territory of the Teutonic Order, under penalty of death, was a barbarous violation of rights.

But it does not follow from this principle that one language may not be preferred for State purposes, to the exclusion of all others. Where the life of the State is concerned, the interest of the nation, as a whole, may require unity of language. This justifies the exclusion of Welsh and Gaelic from the English Parliament, of Basque and Breton from the French Assembly, and Polish, Danish, and French from the German Reichstag. But Switzerland has more respect for the different nationalities of which it is composed, unites German with French as its official language, and, on occasion, even recognises Italian.

The State, too, is justified in providing that the developed language shall be taught in the schools, so that the children of a still unformed people may share in the heritage of a noble literature. On the other hand, a civilised people feel it a bitter wrong if their language is crushed out of School and Church, in favour of a foreign one.

(2) To its own Customs.

Further, a people has a right to observe its own customs so far as these do not conflict with the higher moral law of men, or offend against the rights of the State. The English are justified as rulers in not allowing Indian widows to commit Suttee at their husband's funeral. But the State has no right to prohibit innocent national games.

(3) To its own Laws, within limits determined by the good of the State.

In the sphere of Legal Institutions proper a People as such has less claim to recognition and protection from the State, because the unity and harmony of the State, and the civilisation embodied in it, naturally have a higher claim.

It is essential to the developed State to include the whole population in its laws, and transform or abolish the rights of individual peoples. We cannot find fault with the Romans

for trying to introduce Roman law throughout their empire. But reckless interference is culpable. The English Government made one of the most serious mistakes in this direction when, in 1773, it wished to force the forms of English law and judicial procedure in Bengal on the Indians who were unprepared for it. The same time witnessed in German States, on the one hand, an over-anxiety to keep a wilderness of traditional statutory rights for small fragments of the nation, on the other hand, a bold and revolutionary policy in the introduction of a foreign common law for the whole people.

In the development of law the Nation (*Volk*) thus has a stronger claim than the People (*Nation*): differences of nationality must give way before the unity and equality of law and of justice.

Certainly the Romans found it very much easier to Romanise the subject peoples in law, than to Latinise them in language, and we find no fault with the French for applying their *Code Napoléon* to the Germans of Elsass and to the Celts of Brittany. The English have every right to apply uniform law to Welsh and Irish. Still, we cannot forget that it was the attempt of the Romans to impose the Roman administration of justice on the yet uncivilised Germans which kindled the great struggle for German freedom, and that for centuries it was an admitted principle of German legal theory that every people must be allowed its own law, and every man must be guarded by his own native or national rights.

The old Roman maxim, logically carried out, would have destroyed all national freedom with national law; the old German method rigidly applied would have made all higher development of government and law impossible. Happily for the freedom of nationalities and the advance of civilisation, Romans and Germans met as enemies, and neither principle obtained complete ascendancy.

(4) To its Moral and Intellectual Life.

If the moral or intellectual life of a people is attacked by the power of the State, its members are driven to the most

determined resistance. Men can have no juster cause for resistance to tyranny than defence of nationality[2]. Legality may suffer in the struggle, but law is not injured.

[2] Niebuhr, *Preussens Recht gegen den sächsischen Hof:* 'Common nationality has higher claims than the political relations which unite or separate the different nations of one race. Grammar, language, manners, tradition and literature constitute a fraternal bond which parts them from foreign tribes and makes union with the foreigner against their own tribe a crime.'

CHAPTER IV.

NATIONALITY AS A PRINCIPLE IN THE FORMATION OF STATES.

Nationality always powerful.

AT all times in the history of the world nationality has had a powerful influence on States and on politics. It was the sense of national kinship and national freedom which inspired the Greeks in their struggle with Persia, and the Germans in their conflict with the Romans. Differences of nationality were at the root of the division of the Roman world between the Latin and Greek emperors. The split in the Frankish monarchy, and the separation of France and Germany, was largely due to the difference between the Roman and German languages. Even in the middle ages differences of nationality at times became prominent. But it was not till the present age that the principle of nationality was asserted as a definite political principle. During the middle ages the State was based on dynastic or class interests (*ständisch*), and was rather territorial than national. Later centuries saw the growth of the great European peoples (*Nationen*), but the State did not as yet gain a basis of nationality nor a national expression: it developed a magisterial character (*obrigkeitliche Stat*), finding a centre in the king and his officials.

But not till lately recognised as a principle in politics

Even the theory of natural rights grounded its claims, not on a common nationality, but on human nature and its needs, and on the free will of individual men. Rousseau

or in political theory.

saw the foundation of the State in society, not in a people (*Nation*). The 'nation' to which he ascribes the supreme power in the State (*souveraineté*) is not the united people (*Nation*) but the 'collective body,' or the 'majority of citizens' who have arbitrarily combined to form the State, whether they form only a small fragment of one people or are composed of a union of several nationalities. The French constitutions of 1791 (Tit. III. Art. 1) and 1793 (Arts. 25–28) and of 1795 (Art. 17) adopted the same principles: the words '*peuple*' and '*nation*' were used interchangeably, but both in the same sense of the collective body of citizens (*universalité des citoyens*). The government of the State was simply transferred from the centre to the circumference, from the king to the demos.

Napoleon and the nations of Europe.

When Napoleon, at the beginning of this century, attempted to revive the empire of Charles the Great, and, resting on the French people as a support, to erect a universal monarchy over Europe, he found a stumbling-block in the other peoples, who regarded the French rule with disgust and hatred. In spite of his genius, national resistance proved too strong for the Emperor who could not appreciate nationality. Even then the sense of nationality was only imperfectly developed. Though the sentiment was at work among the unconscious masses, the spirit of nationality was not yet aroused. Even the stubborn and enduring hatred of the English for the French was not so much based on a desire of freeing nationalities (*Nationen*) from French oppression, as on the hatred of the English aristocracy for the French Revolution, on fear of French preponderance in Europe, and on commercial interests.

The English, in spite of the heightened political consciousness which springs from their manly pride and sense of law, distrust nationality as a political principle. They know that their island kingdom includes different nationalities, and that the national feeling of the Celtic Irish has more than once threatened the unity of the State. Their Indian Empire, too, might be endangered by too strong an

insistence on nationality. The Spaniards, in their struggle with the French, felt their own unity as a nation, and hated the French as foreigners: but they regarded it, not so much as a struggle for nationality, as a war for their legitimate prince and the Catholic religion against the fiends of the Revolution. The Germans, owing to the differences of religion and the disintegration of the empire into independent dynastic kingdoms, had lost all sense of nationality in politics, and only a few educated people listened to the inspiring words of Fichte and songs of Arndt, when they tried to revive it. The Russians went to battle and to death to defend their Czar and his holy empire against the godless West: they had no thought for their claims as a nation. The French Revolution vaguely proclaimed the principle of the independence of nationalities, but it was trodden under foot at the Restoration. The Congress of Vienna, with utter disregard of national rights, distributed fragments of great peoples among the restored dynasties. As Poland had been already divided among Russia, Austria, and Prussia, so now Italy and Germany were cut up into a number of sovereign states, and Belgium and Holland pieced together into one kingdom, in spite of conflicting nationalities.

Nationality since the Forties.

The fact that neither the statesmen of the Revolution nor those of the Restoration recognised nationality as a political principle, makes its influence on the political history of to-day more marked and striking. Science, especially in Germany and Italy, had already pointed to the idea of nationality, and hinted at its consequences in politics. But only since about 1840 has the natural right of Peoples to express themselves in the State been appealed to as a practical principle. The impulses to nationality were roused more strongly than ever before, even among the masses, and demanded satisfaction in politics. Peoples desired to give their union a political form and to become Nations. The dynastic system which European States had inherited from the middle ages was now threatened by national demands and passions. Austria especially was shaken by the conse-

United Italy and Germany.

quent striving for independence among its various nationalities. The foundation of a united Italy and of the German Empire was inspired by the idea of nationality, which gathered the scattered members of one people and organised them in one State. The power of this national impulse is unquestionable, though its limits are not so certain.

Nationality clearly has a closer and stronger connection with the State than with the Church, for it is easier for the Church to be universal. The State is an organised nation, and nations receive their character and spirit mainly from the peoples which live in the State. Hence there is a natural connection and constant interaction between People and Nation.

The extreme principle 'A State for each People.'

A People is not a political society; but if it is really conscious of its community of spirit and civilisation, it is natural that it should ask to develope this into a full personality with a common will which can express itself in act; in fact, to become a State.

Modified by relative limits of Peoples and States.

This is the basis of nationality as a practical principle in politics; it is not content with the State protecting national language, custom, and culture, but demands that the State itself should become national. Absolutely stated, it comes to this: 'Every People has a call and a right to form a State. As mankind is divided into a number of Peoples, the world must be divided into the same number of States. One State for every People: nationality the basis of every State.' Is this true? Let us first compare People and State in regard to limits and extent, and see what differences appear.

I. One People includes several States.

If the limits of the State are narrower than those of the people, we find two opposing tendencies:—

Tendency to (1) Isolation.

If the citizens have a strong and lively sense of their political unity, the State tries to form a new and distinct people out of its inhabitants. Thus, in antiquity, the Athenians and Spartans became distinct nationalities by virtue of their political education and isolation; the same was the case with the Venetians and the Genoese in the middle ages, and later still with the Dutch, and partially with the

Swiss. But the grandest example of the formation of a new people by the power of the political spirit, aided no doubt by geographical differences, was the separation of the North American States from England.

If, on the other hand, national impulses feel themselves cramped in a narrow State, they strive to go beyond its limits, and unite with those of the same nationality in other States to form a larger and a national State. Such was the origin in early days of the French State, and in this century of united Italy and united Germany. (2) Combination.

If the limits of the State are wider than those of the people, that is, if it includes two or more peoples, or portions of peoples— II. One State includes several Peoples

If the different peoples are settled in masses, side by side with one another in one country; the following tendencies then appear :— (A) existing side by side.

(1) The State, resting on the superior civilisation of one people, tends gradually to assimilate the other elements, and so to transform the whole nation into one people. Thus, in the old Roman Empire, the West was Latinised and the East Hellenised. So at the present day the Belgian State, resting on the Walloons and its French capital Brussels, seeks to Gallicisę the higher classes of the Flemish population; so Russia endeavours to make the Poles Russian by force. (1) Absorption.

This only succeeds where the dominant people is decidedly superior to the rest in education, mind, and power. The resistance of the Germans and of the Persians shipwrecked the Latinising and Hellenising policy of Rome and Constantinople.

(2) The different peoples tend towards political separation. The movement for Repeal in Ireland, the separation of the Lombards and Venetians from Austria, the constitutional struggles in Austria generally, the renewed double government of Austria and Hungary, as well as the conflict between Magyars and Slavs, Germans and Czechs, all show the persistent force of this tendency. (2) Separation.

(3) Union of differences by (*a*) impartial government,

On the other hand, the State may hold the different peoples together without transforming them in favour of one nationality. But in that case it must be impartial, and give up any claim to be specifically national. It will allow each people free course in its inner life and civilisation, and regard them all as possessing equal rights. Its policy will be governed by general and not by special and national considerations. This is how Switzerland has solved the difficult problem of retaining different nationalities side by side, without danger to the unity of the State. Thus in the central mountain region between Germany, France, and Italy, portions of the three great peoples have formed small republican communities, and united in a federation of peace and neutrality. No doubt individual cantons have a national character, either because all their inhabitants belong to one people, as in the German cantons of Northern and Eastern Switzerland, or in the French cantons of Western Switzerland, or in Italian Ticino, or because one nationality decidedly prevails, e. g. the German in Bern and Graubünden, the French in Fribourg and Valais.

(*b*) Mechanical force.

A very different way of holding different peoples in political union, without transforming them, was long followed with apparent success by Austrian policy, after the failure of Joseph II's attempt to Germanise Austria. Each individual state was to be compelled by the forces of the rest[1]. This mechanical method will only hold the parts in an artificial union, which will last just as long as the compelling force is feared. If its iron hold relaxes, or cannot be brought to bear, the injured nationalities fly violently asunder. Austria has learnt this since 1848.

[1] De Parieu, *Polit.*, p. 304, quotes the words of the Emperor Francis II to the French ambassador at Vienna: 'Mes peuples sont étrangers les uns aux autres et c'est tant mieux. Ils ne prennent pas les mêmes maladies en même temps. En France quand la fièvre vient, elle vous prend tous le même jour. Je mets des Hongrois en Italie et des Italiens en Hongroie. Chacun garde son voisin : ils ne se comprennent pas et se détestent. De leurs antipathies naît l'ordre et de leur haine réciproque la paix générale.'

(B) Assimilation.

If the different nationalities are intermixed with one another, there is no danger to the unity of the State, but the weaker nationality will probably be suppressed and destroyed by the stronger; the higher nationality becomes dominant and assimilates by degrees the isolated elements of the rest. Thus it was that the Germans were finally Romanised in what were once Roman provinces, although they were themselves the ruling race. Thus Irish, German, and French in the United States, after two generations, are assimilated by the Anglo-Saxon population.

The claims of Nationality summed up.

From this general view it appears that the principles of Nationality and of the State interact, but that People and Nation do not necessarily coincide. We cannot therefore allow more than a relative claim to the principle of Nationality, and on closer consideration we arrive at the following results.

(1) Political capacity.

Not every people is capable of creating and maintaining a State, and only a people of political capacity can claim to become an independent nation. The incapable need the guidance of other and more gifted nations; the weak must combine with others or submit to the protection of stronger powers. Thus, in the whole of Western Europe, the Celtic peoples have served as passive material in the formation of Romance and Teutonic states; the diverse nationalities in South-Eastern Europe can only maintain a political existence by resting on one another: the justification of the English rule in India rests on the need of the population for a higher guidance.

Strictly speaking, only those peoples in which the manly qualities, understanding and courage, predominate are fully capable of creating and maintaining a national State. Peoples of more feminine characteristics are, in the end, always governed by other and superior forces.

(2) Diversity of spirit a source of weakness or strength.

As the essence of a people consists in a common civilisation, not in political unity, a people may be conscious of the former and yet be politically divided. One part of it may be inclined to monarchy, another to a republic, and

each may be resolved to realise the ideal it prefers. Such a people may not feel satisfied until it has expressed its character in various forms of constitution. But this diversity is sometimes a source of political weakness: it was because the Greeks were broken up into a number of small city states, that they fell a prey, first, to Macedon, and then to Rome. Owing to similar divisions, Italy and Germany have suffered from foreign domination, and have been hampered in their political growth.

On the other hand, the development of two or more States from one people sometimes enriches the resources of the people, and is a sign of great vitality: as in the case of the sister States of England with its aristocratic monarchy, and North America with its democratic republic. So, too, the existence of a German Switzerland and a German Austria, outside the German Empire, is a proof of the resources of the German people.

(3) Political vocation.

A People which is conscious of itself, and of a political vocation, feels a natural need to embody itself in a State. If it has the power to satisfy this impulse, it has a natural right to found a State.

In the face of the supreme right of a people to its existence and development, all rights of its individual members or of its princes fall into insignificance. The destiny of mankind cannot be fulfilled if the peoples of which it is composed are not in a position to fulfil their function in the world. Peoples must, to use Prince Bismarck's words, be able to breathe and move their limbs, if they are to live. This is the basis of the sacred right of peoples to take political shape and to develope organs for the movement and expression of their common life; the most sacred of all rights, save that of humanity itself, and the foundation and bond of all others.

(4) The national State.

But a 'national'[a] State (*ein nationaler Stat*) need not

[a] ['*national*' is here used in the sense of 'based on nationality' or 'based on one people,' i. e. as an adjective corresponding to *Nation*: but sometimes it is used as an adjective to *Volk*.]

include an entire people: only it must embrace a part which is large and strong enough to assert its character and spirit effectively in the State. It is stretching the principle of nationality too far to demand that the limits of the national State should be as wide and as shifting as those of the language of a People: and is incompatible with the permanence of the State-personality (*Statsperson*) and with the general security of rights. France, Italy, and the German Empire are 'national' States, although there are parts of the French, Italian and German peoples which do not belong to them.

A people (*Nation*) which has become or is just becoming a nation (*Volk*), may be justified in drawing to itself such scattered members as it needs for its existence, but has no right, if it can do without them, to tear them away forcibly from a union with another State in which they find satisfaction.

(5) The ideal State.

But Nationality is not the highest limit of political development. The development of humanity demands as an essential condition, not merely the free manifestation and competition of peoples, but also the combination of these peoples in a higher unity. Law (*das Recht*) rests more upon human nature than upon the peculiarities of Peoples. The developed law of civilised nations is determined more by the requirements of human intercourse than by national custom. The essential institutions of the State are the same in different nations. The highest ideal is of a State which should be based on humanity (*die höchste Statsidee ist menschlich*).

And so a national State (*Volksstat*) may embrace various nationalities, and even a State which is distinctively based on nationality may gain in breadth and variety by the inclusion of foreign elements, which serve to establish and keep open communication with the civilisation of other peoples. Such an admixture may serve as an alloy to give strength and currency to the nobler metal.

(6) Unity.

On the other hand, it is of great advantage to the unity

of the State if the nation is based, in the main, on a distinct nationality (*Hauptnation*), to which the other elements of the population bear an insignificant proportion, like the Germans in Russia, the Slavonic races in Prussia, the Jews in Germany, and the French in North America. It is much harder to establish and maintain the unity of a nation if it is composed of several peoples vieing with one another in power and importance. England had to overcome this difficulty by the union, first of the Saxons with the Normans, then of the English with the Scotch, and finally of the two last with the Irish; and it is a difficulty which Austria has not yet overcome.

(7) Equality. If a State consists of different nationalities, which together form one nation, political rights cannot be apportioned by nationality: political community and equality of rights must be shared by all alike[2].

(8) The verdict of history. How far a people is able and worthy to form a State, cannot in the imperfect condition of international law be decided by any human judgment, but only by the judgment of God as revealed in the history of the world. As a rule it is only by great struggles, by its own sufferings and its own acts, that a nation can justify its claim.

The State as the embodiment of the Nation If the State is to fulfil its part as the embodiment of the nation, it is plain that its laws and institutions must have regard to the capacities and needs of the nation, in a word, it must be popular (*volksthümlich*). A constitution which disregards the peculiar character of the nation, and which does not correspond with its spirit and thought, is an unnatural and incapable body. If it is forced upon a people by a foreign power, or if, as we have seen before now, in times of great political fever, it has been chosen by the disordered and misguided nation, it collapses again as soon as ever that power slackens or the nation recovers its reason. In either case, however, the damage to the political organism is so serious that it may result in the fall of the nation, and at least cripples its vigour for a long time.

[2] Eötvös, *Die Nationalitätsfrage*, Vienna, 1865.

Every great people which is fit to become a nation and a State, has its own political point of view and its own special function as a State, and this cannot be fulfilled unless the nation gives to the State the impress of its own character. This is what is meant by the natural right of a nation to a national constitution (*volksthümliche Verfassung*). Thus the diversity of constitutions corresponds to the diversity of gifts with which nations and peoples are endowed by God.

must grow with its growth.

But it may well be that the peculiar character of a nation is not mirrored, once for all, in the State. A nation outlives the changing phases of its development, and although it remains essentially the same, yet its needs and its views alter with the periods of its life. A national and popular State adapts its organism to the continual development of the nation, but without completely losing its identity. The Roman State through all its varied changes reveals the character of the Roman people. The monarchy, the republic, the empire correspond to the different stages in the life of the people, but in all we see the distinctive impress of Rome. The English monarchy of the Tudors differed from that of the house of Hanover, because the nation developed between the sixteenth and eighteenth centuries. This is what is meant by the natural right of a nation to adapt its constitution to the time.

To sum up: a State is natural if its form, at any time, corresponds to the peculiar character and period of development of the nation embodied in it.

Notes.—1. Cato in *Cic. de Rep.* ii. 21: 'Nec temporis unius nec hominis est constitutio reipublicae.'

2. Frederick the Great, *Anti-Machiavel* 12: 'Tout est varié dans l'univers: les tempéraments des hommes sont différents, et la nature établit la même variété, si j'ose m'exprimer ainsi, dans le tempérament des États. J'entends en général par le tempérament d'un État sa situation, son étendue, le nombre et le génie de ses peuples, son commerce, ses coutumes, ses lois, son fort, son faible, ses richesses et ses ressources.'

3. De Maistre, *Considérations sur la France*, ch. 6: 'Mais une constitution qui est faite pour toutes les nations, n'est faite pour aucune;

c'est une pure abstraction, une œuvre scholastique faite pour exercer l'esprit d'après une hypothèse idéale, et qu'il faut adresser à *l'homme*, dans les espaces imaginaires où il habite.'

4. Napoleon to the Swiss (1803): 'Une forme de gouvernement qui n'est pas le résultat d'une longue suite d'événements, de malheurs, d'efforts et d'entreprises de la part d'un peuple, ne prendra jamais racine.'

5. Sismondi, *Études sur la Constitution des peuples libres*: 'La Constitution comprend toutes les habitudes d'une nation, ses affections, ses souvenirs, les besoins de son imagination, tout aussi bien que ses lois. . . . Aussi rien n'indique un esprit plus superficiel et plus faux en même temps que l'entreprise de transplanter la Constitution d'un pays dans un autre, ou celle de donner une constitution nouvelle à un peuple, non d'après son propre génie ou sa propre histoire, mais d'après quelques règles générales qu'on a décorées du nom de principes. Le dernier demi-siècle, qui a vu naître tant de ces Constitutions d'emprunt, peut aussi rendre témoignage qu'il n'y en a pas une seule qui a répondu ou aux vues de l'auteur, ou aux espérances de ceux qui l'acceptèrent.' (Introduction, p. 38.)

6. L. Ranke (Zeitschr. i. 91): 'Our theory is that every nation has a policy of its own. But what is the meaning of this principle of national independence (*Nationalunabhängigkeit*) which penetrates all spirits? Is it merely that no foreign judge must sit in our cities, and no foreign troops march through our land? Is it not rather this, that we must develope our own mental powers, independently of others, to the full extent of which they are capable?'

[There is an interesting chapter on 'Nationalities' in Laveleye, *Le Gouvernement dans la démocratie*, Livre II. ch. iii.]

CHAPTER V.

SOCIETY.

FRENCH political theorists, especially since Rousseau, have been inclined to regard the State as a Society, and to identify the conceptions of 'Nation' (*nation*) and 'People' (*peuple*) with that of Society. Hence the science of the State has been confused, and political practice has also suffered. German political theory distinguishes more sharply between the different conceptions, and so saves many mistakes. It gives the State a firmer basis and a more secure operation, and protects society against the tyranny of the State.

Relation of Society (1) to Nation and State;

The Nation (*Volk*) is a necessarily connected whole, while Society is a casual association of a number of individuals. The Nation as embodied in the State is an organism, with head and members; Society is an unorganised mass of individuals. The Nation has a legal personality (*ist eine Rechtsperson*), Society has no collective personality, but only consists of a mass of private persons. The Nation is endowed with unity of will, and the power to make its will actual in the State. Society has no collective will, and no political power of its own. Society can neither legislate nor govern, nor administer justice. It has only a public opinion, and exercises an indirect influence on the organs of the State, according to the views, interests, and demands of many or all of its members. The Nation is a political idea: Society is only the shifting association of private persons within the domain of the State.

No doubt a Nation and a Society, consisting of the same men, interact in many and intimate ways. The State lays down the law for Society: it protects it and furthers its interests in many ways. On the other hand, Society supports the State with its economic and intellectual resources. If the Society suffers, the State suffers with it: while a healthy, beneficent, and cultivated Society strengthens the State, and is the condition of its welfare.

But there is not always entire harmony between the State and Society. Sometimes Society, with an eye to its own special interests, or guided by chopping winds of public opinion, makes demands on the State, which it is obliged to reject as unjust or injudicious. Sometimes the State claims of Society services and sacrifices which it is loth to undertake. The permanent security of the State clashes at times with the interests and desires of the moment. From time to time Society suffers from disorders, which can best be relieved by the State, and defects appear in the constitution or administration of the State, the removal of which stirs Society to its depths. One of the main problems of public law and of politics is to reconcile this opposition, justly and judiciously.

(2) to People.

The conceptions of People (*Nation*) and Society also are related, but not identical. Compared with a hereditary People, Society appears a shifting conglomeration of individuals. A People has created in its language an organic expression of its common spirit, and Society makes use of the national language, so far as it finds it convenient, but has no language peculiar to itself as a Society. A People may branch off into different States: we limit our conception of a Society to the inhabitants of one State: or if we speak e. g. of European Society, we include the inhabitants of all civilised European States, notwithstanding that they belong to different peoples. Within the State, too, the idea of Society is independent of differences of nationality, including all who are living in the State. A People seems to have a natural organisation of its own, at least on

the physical side: a Society is only a sum of individual men.

Gneist's 'Society of Industry.'

Gneist has done a service to political science by accentuating the difference between 'State' and 'Society,' and calling attention to the friction between them. But his designation of modern society as a Society of Industry (*Erwerbsgesellschaft*) seems too narrow. Certainly the acquisition of wealth is one of the strongest and most wide-reaching interests of Society, but still not the only one, nor the most important. Society has regard to the enjoyment of wealth as well as to its acquisition: further, it attaches a high value to family life, apart from all considerations of wealth. It values sociability, and has a lively interest in culture, literature and art. To lay stress on the acquisition of wealth, in defining Society, is to make it too material and selfish, and to ignore its efforts after ideals and a common good. The numerous institutions for the poor and sick, for science and art, voluntarily founded and richly endowed by Society, without any compulsion from the State, are sufficient confirmation of the truth of this position.

CHAPTER VI.

TRIBES.

Tribes express the inner differences of a people.

As the races of mankind part into different peoples (*Nationen*), so peoples divide into tribes (*Stämme*). The careful observer can trace the kinship of peoples in their language, customs, and laws; but they themselves, though they belong to the same race, have become foreigners to one another, and can no longer understand one another's language.

On the other hand, the different tribes of one people feel themselves bound in a common life by common language and custom. No doubt even among tribes tribal distinctions and peculiarities come to disturb the sense of common nationality. But the national language, to which the ears of all the tribes are open, maintains the sense of national kinship and unity. In dialects we see both elements, national unity and tribal peculiarity. Dialects bear the same relation to a language as particular tribal laws to common national law. Tribes, like peoples, are the product of history, which tends to develope and bring to light internal differences. But they are only fractions of a people: they have no independent national type of their own, but are only expressions, variously coloured or accentuated, of the common national spirit.

Their influence, for good or evil.

They thus perpetuate their separate existence, and keep alive the inner differences which influence the character of the people. While they give a richness and variety to

national life, they have often proved a hindrance to the unity of a State. Though Rome grew strong by the internal conflicts of parties, resting originally on tribal differences, it was the violence of tribal antagonisms which prevented the Greeks from forming a durable collective State.

Tribal antagonism.

The antagonism of tribes has also had a strong influence in modern Europe, especially among the Germans, whose ancient constitution was nothing but an organisation of tribes. The mediæval tendency to individualism found in it a strong support, as the modern tendency to unity found a strong hindrance. This appears in the history of Italy and Germany. In both countries, it is true, the old tribes were broken up at an early date, in Italy mainly by the independent development of the towns, in Germany chiefly by the policy of the kings and the separation of territorial lordships. But tribal feeling and individualism still continued to be a power in the cities, and although, when once the older tribal duchies came to an end, the different tribes combined to form large territories, tribal jealousy and enmity still played a considerable part in the downfall of the German Empire, and even now the opponents of German unity make use of tribal prejudices to embarrass, if they cannot prevent, the national development.

The tribe as the germ of a new nation.

History teaches us that a tribe may furnish the starting-point for the formation of a new nation. It is more likely to become a nation and form a new State, however small, than to form a new people. This last stage of development is only reached when a fusion takes place, and with it an alteration of language, as happened with the Teutonic tribe of the Lombards in Italy, or if the tribe developes its dialect into a new language of its own, as the Dutch have done.

CHAPTER VII.

CASTES.

Divisions within the nation and tribe.

WITHIN the geographical limits of people, nation or tribe, appear further differences which correspond to no geographical limits—we may call them different platforms, so to speak, in the structure of society, or different tendencies of the collective life, or different grades of political importance and development. Such are Castes, Privileged Classes or Estates (*Stände*), and Classes.

The system of Castes has been most fully worked out in India, but has not been without influence in Egypt and Persia. It belongs preeminently to the Aryans of Asia, and has never been acclimatised in Europe. But in America it found a new application in the difference between the white and coloured races. The system of Estates (*Stände*) appears among many nations, both ancient and modern, but was carried to its fullest development in the Europe of the middle ages among the Teutonic nations. The system of Classes presupposes a rationally organised State, such as those of China, Athens and Rome, and many modern States. Castes are regarded as the work of nature, or the unalterable creation of God; Estates appear as the product of national history, and differences of occupation; Classes are an institution of the State. In Castes we see the authority of religious faith: in Estates, the power of social life, of economical and educational conditions; in Classes, the organising capacity of statesmen.

Castes are of necessity hereditary and unchangeable, like courses of masonry firmly built one over the other. Estates grow like plants, and have an organic development, like peoples and States. In them free choice of profession comes in to modify or crush hereditary rights. In earlier times Estates are still hereditary and akin to Castes, but as civilisation advances, freedom of occupation comes in, and they approach to Classes. Classes, like works of art, alter with the different aims of the State.

The Indian Caste-system, which may be regarded as typical, is represented in the Laws of Manu as a creation of Brahma. The belief, which Plato wished to implant in his State by the myth of the metals [a], is fully established among the Hindoos. The Indian Castes.

The highest Caste, that of the Brahmans, in which the Aryan blood remained purest, though not quite untainted by other elements, came from the mouth of God. They are therefore, as it were, the living word of God, the purest and fullest expression of the Divine. Science, religion and law are their special care. The meanest Brahman, as such, ranks higher than the king. Their nature is preeminently divine, and though they are not forbidden to occupy secular offices, and mix in secular business, their purity is heightened by abstinence from material pleasures [1]. The man who strikes a Brahman with a blade of grass, incurs the condemnation of hell. (1) The Brahmans.

The second Caste, the Kshatriyas, from among whom comes the king, is created of the arm of God. They are the incarnation of force and physical strength, and are a Caste of born warriors and nobles. Though trade is not forbidden them, their proper calling is to bear arms. (2) The Kshatriyas.

The third Caste, the Visas or Visayas, proceeds from the thighs of God. The higher civil professions belong to (3) The Visas.

[a] [*Rep.* iii, 415.]

[1] *Laws of Manu*, ii. 162 (edited by A. Loiseleur Deslongschamps, Paris, 1833): 'A Brahman shall shun worldly honour like poison, and thirst for the scorn of men as for nectar.' [c. ii. § 162 in Sir W. Jones' Transl. edit. by Grady, Lond. 1869, p. 33.]

them: they are called to agriculture, cattle-raising, and commerce.

(4) The Sudras.

The fourth and lowest Caste, the Sudras, springs from the feet of God. They are the servile population: devoted to the material wants of life, and unworthy to read the sacred books.

Intercourse between Castes.

The higher kind of marriage presupposes equality of birth: but a man of higher Caste may marry a wife of lower Caste, though a wife may not marry beneath her. But numerous *mésalliances* have in course of time produced many inconveniences, and have given rise to new hereditary pseudo-castes (*Misskasten*) of rejected outcasts.

It is very rarely possible for an individual to pass from one Caste to another: rigid exclusiveness is the general rule. The system of Caste prevails even after death, dominating the future life as well as the present. It is only very rarely, and at the cost of many thousand years of effort, that even a Kshatriya can rise to the divine height of a Brahman. On the other hand, a false step at once thrusts him downward, almost beyond hope of recovery.

The origin of Castes

We know that the Hindoos are mistaken in their belief, and that the Castes are in great measure the product of human history. In the Vedas is preserved the memory of a time when there were privileged classes (*Stände*), but as yet no Castes.

in differences of Race

The opposition between the three higher Castes, called collectively Aryans, and the Sudras, can be traced back to original difference of race: the white Aryans conquered the land of the dark-skinned Sudras, and settled there as their lords, just as the white Europeans settled among the primitive red population in America. The old name for Caste, 'Varna,' meaning 'colour,' points to this original opposition between white and dark races. As we go higher in the Castes, we find the white race purer, as we go lower we find more mixture with the original dark race[2]. The two highest

[2] For the history and nature of the Indian Castes, see Lassen, *Indische Alterthumskunde*, Book II. 11; Gobineau, *De l'inégalité des races*

Castes stand out above the third, as in most Aryan peoples we find an aristocracy above the demos.

Finally, the elevation of the Brahmans over the Caste of knights and nobles, and even over the kings, was the last in time; and can only be explained, in my opinion, by the rise of the new pantheistic religion of Brahma, which won a spiritual victory over the old polytheistic worship of nature-gods, by the heightened sense of the divine among the Brahman priests, sages and saints, and by the energy and devotion with which they remained loyal to their divine calling amid every danger, and willingly resigned earthly sovereignty to the kings [3].

or of Religion.

The system of Castes thus arose gradually out of historical events and struggles. But afterwards it received a religious sanction, and was permanently stereotyped. It was fostered with such care in the whole education of the young, by the prescribed religious duties, by all the institutions of private and public life, that men ceased to consider any deviation from it as possible, and the system was handed on unchanged from generation to generation.

The Caste-system is not an institution of the State, nor a part of the constitution. It is rather a framework into which the State is fitted, and to which it is subordinated. It is a universal and perpetual arrangement of the world, dominating all relations. For this reason higher development of the State is impossible so long as the State is bound to serve the system of Caste. It cannot develope freely according to its own principle of life. How can a political ideal become actual in face of rigid unalterable masses, held in separation and bondage by a higher law? What meaning can the authority of the State have, and how can it exercise its coercive power when its subjects believe that obedience

A stereotyped system dominating the State.

humaines, ii. p. 135; M. Duncker, *History of Antiquity*, Book V. ch. iv, Eng. ed. [See art. 'India' by W. W. Hunter, in *Encyclopædia Britannica*.]

[3] I have treated this view in greater detail in my *Die Altasiatischen Gottes- und Weltideen*, p. 29 f.

to the government involves misery and suffering for thousands of years?

Order and permanence.

No doubt the hereditary principle (*das Erbrecht*) is of great importance in the State. It maintains the connection between past and future, it secures the permanence, so to say, of the bodily structure of the State, which survives the life of individuals. But where it dominates public law absolutely and exclusively, it fetters and cripples the best forces. The State becomes at last a mummy, in which the embalmer's art vainly tries to conceal the features of death[b].

The system of Castes tends to harden and stereotype the differences between the strata of society. The upper aristocratic Castes, richly endowed with hereditary privileges, may feel satisfied with it, but it only presses the more hardly on the middle and lower strata. It brands their humiliation with the mark of contempt, and leaves the individual no hope of escaping from the bonds in which he is held fast. It heightens the authority of the upper and destroys the freedom of the lower classes.

But no progress or freedom.

It is true that comparative perfection in individual professions, and even remarkable intellectual activity in the highest circles, is compatible with it. But by making family succession and tradition of race the highest law, it denies utterly the individual freedom which strives to go beyond these limits. It has produced saintly hermits, great philosophers, distinguished poets, brave warriors, excellent fathers and sons, clever craftsmen, but it has never produced great statesmen, and nowhere tolerated free nations.

All its institutions are directed to the maintenance of order, none of them aim at progress in life. Its ideal is rest: movement is dangerous. Life is an unchanging repetition, a wheel revolving for ever in the same way and round the same axle. Where life has so little value, we can understand how it was that the Buddhist doctrine of absorption into nothingness appeared as a real relief from the eternal

[b] [For the use and abuse of 'the cake of custom,' see Walter Bagehot's *Physics and Politics*, p. 27, and ch. iii. and iv.]

monotony, and found numerous followers. Indian civilisation is the blossom and fruit of the Caste-system. But deeply rooted as this was, it could not permanently save that civilisation from internal decay, or defend Indian independence against hostile conquest.

Modern India.

The India of to-day inherits the relics of the Caste-system as a burden from the past: it no longer bases upon it its conception of the order of the world: under the influence of the English spirit it is building upon another foundation.

CHAPTER VIII.

PRIVILEGED CLASSES OR ESTATES[a].

Estates or Orders widespread in Europe.

THROUGHOUT the European nations we find Privileged Classes or Estates (*Stände*) instead of Castes. Both give an organic order to the various members of the nation. But Estates differ from Castes in this, that they are influenced by the movement of history, they develope. In Europe especially, Castes have become Estates, and have passed through many and varied changes.

Their legendary origin.

The earliest form of Estates recalls the Caste-system. They were at first hereditary, and the attributes assigned to them and the myths describing their divine creation point to an original affinity to the Indian Caste-system. The Edda tells how the god Rigr, on his wanderings, begot first the Thral, the ancestor of the servile population; then, in a better home, the free Karl, the ancestor of free peasants; and finally, the noble Jarl, whom he taught to throw the dart and poise the lance, and to whom he entrusted the sacred secret of the Runes. These Estates too differed in build and complexion, the Nobles having brilliant white complexion, bright hair and shining cheeks, the servants (*Knechten*) ugly face and bony limbs.

(1) Priests.

The Druids of Gaul may be compared with the Brahmans[1].

[a] [It seems simplest, for brevity, to translate *Stand* here and in ch. xvii. by 'Estate' in its old sense of a social class, as distinct from 'Class' in the political sense which Bluntschli gives to it. The French translation has *ordre*. Elsewhere 'Estates' is generally used only of the Estates as assembled in Diet or Parliament.]

[1] Cæsar, *de B. G.* vi. 13: 'Illi rebus divinis intersunt, sacrificia publica ac privata procurant, religiones interpretantur. Ad hos magnus

They also have the care of religion, science and laws in their charge, although they, and still more the pre-Christian priests of the Germans (whose name *Godi* is derived from *Gott*, as Brahman from Brahma), are more closely connected with the national nobility. The mediæval position of the Clergy, as a special order of Christian priests, bears a closer resemblance to the Caste of Brahmans.

(a) Nobility.

The old Nobility (*Adel*) whom we find everywhere in Europe in the earliest records, was everywhere a hereditary class, and as a rule, absorbed the chief functions of the two highest castes. Language generally bears witness to its hereditary character: the Athenian Εὐπατρίδαι and Roman *Patricii* are so called from their descent from noble fathers, while the German *Adalinge* derive their name from the family (*Adal*) from which they drew their blood[a].

The *Lucumones* of Etruria and the knights of the Gauls were a hereditary nobility. Legend loved to derive the highest families, and especially those of princes, by immediate descent from gods or heroes, and to honour them as the seed of the gods.

To this primitive nobility, as a rule, belongs the priesthood, and the science of things divine, as well as the knowledge and practice of law. They are appointed before others to the highest official positions, and they take a high rank in the military system. On the other hand, civil professions are for the most part closed to them. Usually they have dependents[a] (*hörige Leute*) under their protection and in their service; and are distinguished even in the sphere of private law by their lordship of the soil (*Gutsherrschaft*). They are fond of living on hills, and in the cities, too, choose the high ground[b].

These characteristic traits are found with slight variations in the early history of the European nations. The further

adolescentium numerus disciplinae causa concurrit, magnoque ii sunt apud eos honore. Nam fere de omnibus controversiis publicis privatisque constituunt.'

[a] See Schmitthenner, *Statsrecht*, pp. 31 and 103.

[b] [Cf. Arist., *Pol.* vii. 11. § 5, 1330 b 19.]

we trace back this institution, half political, half religious, the closer do we find the likeness to be.

(3) Freemen. The Freemen (*die Gemeinfreien*), among Greeks and Romans and Germans, form the strength of the demos and of the nation. They are in the full enjoyment of national rights: and are the mainstay of the State. The nobility indeed rise above them, but not like the Indian noble as an essentially different creature, but as a distinguished class rising out from their midst, but still united with them, and having their root in the same ground of national rights.

The Freemen in early times are as a rule owners and tillers of the soil. As such appear the Γεωμόροι in the early Athenian constitution, the ordinary Spartiatæ, the Roman Plebeians, the Freemen of all German tribes, among whom free birth and free land enjoy special rights. They also take part in trade, though less readily. They may perhaps so far be compared in their way of life with the Visas, but they are raised above these, in public respect, by their capacity to bear arms—they form the main body of the infantry—and they further exercise political rights in the community, which vary with its constitution.

Though subject to authority (*die Obrigkeit*), as freemen they are not dependent on any special lord. They have not perhaps originally the right of patronage (*Schutzherrschaft*), but they can have their 'own men' (*Eigene*). Their Estate is originally a hereditary one: as a rule the free man is born free (*ingenuus*).

(4) Dependents. Lastly, we shall find many traces of an Estate which appears from the first to be breaking up, and which therefore is somewhat doubtful, an Estate of Dependents (*hörige Leute*), occupied like the Indian Sudras with the lower needs of life. Sometimes it consists of conquered inhabitants, always of the same race as the conquerors, sometimes of the poor brought into permanent servitude by oppression and debt. To this class belong the θῆτες and πελάται of the Greeks, the 'Clients' in Rome, Gaul, and Britain, the *Liten* of the Germans.

They have a lord to guard and protect them (*Mund- und Schutzherr*), προστάτης or *patronus*. They are part of the nation, and are not on the same level as slaves (*die Eigene*), but their freedom, their rights, and the value attached to them, are less than those of the freeman proper. Handicrafts are chiefly carried on by them: and freed servants generally pass into this class.

Estates the basis of mediæval law and politics.

The history of these estates is most closely interwoven with the history of each several State: changes and revolutions of constitutions are very often only the result and the expression of internal and unnoticed changes in the relations and ideas of Estates. The whole structure of law, in the middle ages, takes its character and colour from the idea of Estates. Every Estate had its own special laws and forms of justice, as it had its own costume. The Clergy lived by canon law, Princes by the law of nobles (*Herrenrecht*), Knights had their feudal law (*Lehensrecht*), Retainers (*Dienstleute*) their special law (*Dienstrecht*), Citizens the law of their city, and Peasants their manorial customs and law (*Hofrecht*). The political structure of the nation was conditioned by these differences, and its unity broken up.

At first hereditary, they become professional,

But during the middle ages these privileged classes (*Stände*) tended to become less hereditary, and more professional (*Berufsstände*). In later centuries there are four main Estates—(1) Clergy, (2) Nobles, (3) Citizens or third Estate, (4) Peasants. The two first, aristocratic Estates, won a commanding political position. The third saved civil freedom. The fourth was powerless, and subject.

and finally decay.

At the end of the middle ages we find these four Estates have decayed, and in great part dissolved. But isolated remains last on like ruined masonry into the modern world. To understand the modern State aright we must know the meaning of these Estates in the middle ages. It is only by contrast with them that the modern State comes to understand itself.

CHAPTER IX.

I. The Clergy.

The Clergy not a natural order.

The Clergy held the first place among the mediæval Estates. According to the strict doctrine of the Church they were not a national estate at all: they were an *ordo ecclesiasticus*, not an *ordo civilis*. The State was regarded merely as an organisation of laymen, above whom the priesthood were raised by their consecration. The Christian priests did not, like the Brahmans, rest their claims on divine descent—for they did not perpetuate their order by marriage—but rather on divine institution. They are filled by the Holy Spirit, and consecrated by the vows of the Church. The basest and most corrupt Clerk, in virtue of his order, stands high above the most eminent and virtuous laymen, as gold above iron, or the spirit above the body.

They stand outside the State, and above it.

The ideals of the Clergy were near akin to those of the Brahmans. Only the Christian clergy did not give up the secular rule as the Brahmans did, and were less inclined than they to conform to the ordinance of the State. According to the logical doctrine of the mediæval Church the laws of the State were not binding on the clergy: it was for them to examine and judge, and then decide how far they would voluntarily obey them. As soon as the privileges of the clergy or the interests of the Church seemed in danger, the clergy refused all obedience, resting on the word of Scripture, 'We ought to obey God rather than man[a],' and on

[a] [Acts v. 29.]

their spiritual superiority. On the other hand, they demanded of the secular authority that it should obey the laws of the Church without contradiction, and lend its power to carry them out.

They even withdrew themselves from secular jurisdiction in civil as well as in criminal cases. Their pretensions could not tolerate the supremacy of secular judges, of 'the sheep above the shepherds.' They were not bound to service in war, because weapons of iron did not suit their religious vocation. But they also avoided the obligation to pay taxes, appealing on every occasion to their immunities, in order to shake off every burden the State laid on them. As clergy of Rome they despised the limitations of nationality. They were not citizens of any one nation, or of any definite country; they only recognised the universal bond of Christendom centred in Rome, the capital of the world, the seat of the Popes. The canon law was the law of their life, and they refused to be accountable except to the mild jurisdiction of the Church.

However, even in the time of their greatest power the clergy never completely severed themselves from the State, partly owing to the circumstances of their history, partly from considerations of their own interests.

The Christian Church, with its clergy, had arisen and become great within the old Roman Empire with its world-wide and far-reaching domination; and the political powers of Rome did not resign their authority. They demanded of all inhabitants of the Holy Roman Empire obedience to the laws, to the imperial government, and the imperial courts. The clergy could at most secure isolated privileges from the emperors: their subjection was unquestionable.

Growth of their political power.

The Frankish monarchy still held fast to the subordination of bishops and priests to the king, and to the imperial laws and courts, although now the power of the State had diminished, and the Church had become more independent. Under the German princes the immunities of the Church were extended by slow degrees, at first more by grace and

favour of the king than by any recognition of the ecclesiastical law, which now began to assert its own authority with arrogance. Even when the rights of the Church had gradually won their way against contradiction and resistance, their authority was not everywhere the same.

Italy. Interest also united the clergy most closely with the laity and the State. During the middle ages the head of the Church, the Pope of Rome, acquired a political sovereignty over the so-called *Patrimonium Petri*. Partly by royal grant, partly by the gifts of princes, there arose a Church-State governed by clergy. The highest spiritual authority thus came to be associated in Rome and the Roman territory with secular sovereignty. Not merely were the Popes called upon, as supreme bishops, to represent the interests of the Church, if need were, before the Emperor and the various States, but being among the first of Italian princes they were deeply involved in the interests of Italian policy. This was indeed 'the ruin of Italy.' (Machiavelli, *Discorsi*, i. 12.) They were strong enough to keep divisions alive in Italy, but not to unite Italy under their sovereignty, nor to defend it from the inroad of hostile armies, though they were always ready to call in foreign powers to their help if their policy required it.

They raised Rome again to the position of the first city in Christendom, and adorned it with churches and works of art; but the gifted Romans, under their Church government and discipline, fell behind the citizens of the Italian republics in civil virtues and achievements, and the Church-State became the warning instead of the pattern of higher political development. The modern world has learnt that ecclesiastical rule is not fitted for the sound government of the State, and the secularisation of the States of the Church has proved a great political gain to the Romans.

Germany. Next to Italy, Germany did most to raise the political power of ecclesiastical princes. Even under the Frankish monarchy the bishops held a prominent place in the national assemblies, sometimes associated with the great laymen,

especially the counts of districts (*Gaugrafen*), as an assembly of *Majores* or *Seniores*, sometimes in separate ecclesiastical assemblies. But their contact with secular power and dignity comes out most clearly in the constitution of the German Empire. There we find three out of the seven electors are ecclesiastical princes, the Archbishops of Mainz, Köln and Trier; and the Archbishop of Mainz, as Arch-Chancellor of Germany, votes first. They held the first place in the Electoral College, and at the same time as territorial princes they early acquired an almost sovereign independence.

(1) The imperial constitution.

Besides these there was a large number of Archbishops, Bishops, and Abbots, who had acquired rights of territorial sovereignty over definite districts, and who sat and voted at the imperial diets, either giving a vote each (*eine Virilstimme*) as proper princes of the Empire—e. g. the Archbishops of Bremen, Magdeburg and Salzburg, and the Bishops of Augsburg, Würzburg and Basel; or taking part in a collective vote (*Curiatstimme*), and sitting together on the so-called 'Prelates-benches' (*Prälatenbänke*) which corresponded to the benches of the Counts. In the heraldic order (*Heerschildsordnung*) of the law-books, the ecclesiastical princes ranked next to the king. The secular princes, though equal with them in the constitution of the Empire, were placed third, because they might conceivably become vassals of the ecclesiastical princes, while the converse would be unseemly.

In the great contest of Investitures between the Popes and the Saxon emperors, it was proposed that the princes of the Church should give up their secular sovereignty and devote their life to the Church, but in vain. Such a suggestion, even when it came from the Pope, was indignantly rejected by the ecclesiastical princes of Germany. The consequence was that in Germany too ecclesiastical offices became involved with political offices and political interests.

The same thing happened in the provinces of the Empire. The local prelates—bishops, abbots, priors, masters of

(a) Provincial constitutions.

religious orders—formed a separate estate, with a right to sit in the provincial assembly (*Landtag*), either as a separate Curia (*Prälatencurie*) or along with the nobles, and exercised a more or less extensive jurisdiction on their domains. Their rights in the provincial estates (*landständische Rechte*) were generally based on their position as territorial lords. Hence, although they might secure their own immunity from taxes and military service, they could not urge the same claims for their servants (*Ministerialen*) and peasant dependents (*Hintersassen*) who were always laymen. The country needed their taxes, and the prince of the country as feudal lord required them to furnish mounted troopers.

One advantage which the ecclesiastical aristocracy had over the secular was that it was not hereditary, but rested on personal education and election. The son of an artisan might become pope, the son of a peasant an archbishop [1].

The Reformation.

But as time went on this predominance of the clergy and the aristocratic powers of the ecclesiastical princes and prelates was shaken and destroyed. The German Reformation of the sixteenth century struck a fearful blow at the secularised Church. With the spread of Protestantism ecclesiastical princedoms became temporal, sees were abolished, monasteries broken up, and religious orders dissolved. Before the Reformation there sat in the German *Reichstag* the three ecclesiastical princes, three other archbishops, and thirty-nine bishops. After the peace of Westphalia the number was reduced to three electoral princes, one archbishop (Salzburg), and twenty bishops. Only Swabia and the Rhine-provinces now retained their bench of prelates. The whole of the North and a good part of the South had rid itself of ecclesiastical sovereignty.

Even in the countries which had remained Catholic the change was only postponed. There was no part of Germany

[1] Pope Gregory VII, himself the son of a carpenter, stated this clearly: 'Rome has become great among heathens and Christians *quoa non tam generis aut patriae nobilitatem quam animi et corporis virtutes perpendendas adjudicaverit.*' Cf. Laurent, *Étud. sur l'Hist.* vii. p. 335.

where ecclesiastical sovereignty survived the revolutionary movement at the beginning of this century. Even the electoral princes of the left bank of the Rhine were carried away by the storm, and their domains incorporated with France. The domains of the other ecclesiastical princes were granted by way of compensation to secular dynasties.

With the end of the Empire the ecclesiastical lords lost their position as an imperial estate, and maintained an insecure position in certain provincial diets (*Landstände*). Once again, after many centuries, the episcopate became a purely ecclesiastical office, without political power. Their jurisdiction fell with their territorial sovereignty.

The Catholic clergy having thus lost their temporal position and power could no longer realise the mediæval ideal. Modern political feeling could not tolerate any subordination of laymen to clergy: it demanded universal obedience to the laws and the constituted authorities of the State. The time for clerical immunities and privileges was gone by; all were subject to one law, one jurisdiction.

England and France.

The history of the clergy in England and France was somewhat similar. They had never acquired the same territorial sovereignty as in Germany, and in both countries the secular side of the State was more strongly asserted than in Germany. But the clergy were an estate: in England they sat with the lords temporal in the Upper House[b]; in France they formed a separate estate, the first in the kingdom. But the Reformation in England and the Revolution in France profoundly affected their position. The mediæval immunities disappeared before the principle of common and equal obligation to the law (*Rechtspflicht*).

When Louis XVI summoned the States-General in 1789, the clergy voluntarily abandoned their separate position and

[b] [The clergy, as a body, declined the position of a parliamentary estate, which was offered to them by Edward I. The Lords spiritual still sit with the temporal peers: but it is probable that in the middle ages they owed their seat rather to their secular position as tenants-in-chief than to their clerical dignity.]

anticipated the nobles in entering the National Assembly, which represented not the estates of the middle ages, but a body of free citizens.

Thus the mediæval estate of the clergy was everywhere broken up. The great distinction between clergy and laity had lost its practical effect, and was no longer recognised by the State in its system of rights. The great mass of the clergy were merged in the middle classes, the high dignitaries of the Church in the aristocracy.

CHAPTER X.

II. The Nobility.

A. *The French Nobility.*

The old Nobility of birth at Rome became a Political Nobility of personal merit.

The Patricians of ancient Rome formed a hereditary nobility of birth (*Geschlechtsadel*): but internal party struggles early transformed it into a political aristocracy, based not on descent, but on the free choice of the people to public offices. This political aristocracy of the senatorial families lasted through the Republic into the Empire. The old patrician families, which in the time of Augustus had dwindled down to fifty, and very seldom received an addition (the families of the Emperors were in law always patrician[a]), still perhaps in fact, though no longer in law, formed the nucleus of this aristocracy; the ancient glory of their name, traditional experience in State affairs, often too their large property and personal connections, won them the respect to which they owed their place in the Senate. But besides these, the aristocracy was constantly renewed and quickened by the addition of eminent men, distinguished as generals, statesmen, orators, or lawyers, who under the Republic entered the Senate by election to public offices, under the Empire by the summons of the Emperor. Thus political merit and public distinction had become the basis of the later Roman nobility, which even at the time of its decadence retained a remnant of its bygone freedom and greatness.

[a] [Mommsen, *Röm. Statsrecht*, ii. p. 765.]

Mæcenas' Ideal.

Mæcenas' famous discourse[1] on the Principate is an excellent expression of the idea which Roman statesmen had of the aristocracy in imperial times. The Emperor's friend advises him to purge the Senate of the incapable members thrust upon it by the confusions of the civil wars, and to fill up the vacancies by careful nominations. He recommends him to reject no one on the score of poverty, but rather to supply poor and capable men with the needful means. In the choice of senators he should look not merely to Italy, but also to the allies, and even to the provincials, and so assemble round him the first men from among all the peoples of the empire, men marked by family, character or wealth, as leaders of the people, and should give them a share in public affairs and in the government of the world. To increase the number of eminent men that assembled in the Senate at Rome, would be to secure a better provision for the needs of the State and the loyalty of the provinces. The Equites, distinguished by their wealth, should form a lower aristocracy of wealth, composed of eminent men of the second rank. Further, that the sons of senators may be fit to succeed to the duties of their fathers, they must be worthily educated in the sciences and in arms.

The French Nobility.

The history of the French Nobility is a very chequered one. We can distinguish the following periods, each with its special characteristics.

The Merovingian Period, 481–752.

1. The foundation of the French Nobility belongs to the Merovingian period (481–752). Strangely enough the traces of an old Frankish nobility of birth are very uncertain. But this period developed a nobility of personal fealty (*ein persönlicher Treuadel*), based mainly on the relation of the king to his people. Perhaps even here special regard was paid to the old families of nobles. But besides these, other free Franks and Germans were received by the king among his *Antrustiones*, and even Romans as guests of the

[1] Dio Cass. lii. 14–40.

king (*convivae regis*) received a similar rank. Sometimes persons of low birth, slaves and dependents, are found rising to the highest offices of the empire, and thus becoming nobles.

This Nobility then had grown out of very mixed materials. It was, at least for the most part (as Schäffner has shown in detail[2]), not a hereditary nobility, but a nobility of personal service, bound by an oath of fealty. The privilege of a higher *Wergeld* was a sign and a consequence of the higher value attached to its members. Beyond this its privileges in private law were few. But politically it was distinguished partly by the association of the position of an *Antrustio* with high offices of State, court posts, and ecclesiastical dignities, partly by participation in the King's Council and a prominent place at the national assemblies.

In the institution, as in the members who composed it, we find the same mixture of Romance and Teutonic elements. But the Teutonic element tended to gain the mastery. To this belong, (1) the personal tie of fealty to the king (*trustis dominica*), which was propagated by family custom and family interest, and was extended beyond to the vassals of other lords (*Seniores*); (2) the grant of royal benefices to the great nobles, mainly in the form of lands.

These two relations form the chief source of the later Feudal System.

2. The change in the royal dynasty was in great measure the work of a revolution in the nobility. The Carolingian Mayors of the Palace, as representatives of the king, put themselves at the head of the powerful military nobility. They helped to confirm the nobles in their domains: and then with their aid they drove out the degenerate kings. The Carolingian Period, 752–987.

This movement, as Guizot has pointed out[3], found its main and constant support in northern France, in Austrasia, where the Germans were dominant, and which was hence called *Francia Teutonica*, as opposed to the Roman

[2] *Geschichte der Rechtsverfassung Frankreichs*, i. p. 217 ff.
[3] *Essais sur l'histoire de France*, p. 52 ff.

France of the South. The result was that the French Nobility received a distinct Teutonic stamp.

The Nobility of office and service became more and more a feudal nobility (*Lehensadel*) of Barons, Seniores, and Vassals, each of whom learnt to feel his independence within his own sphere. Thus the transition was made from the hierarchy of royal officials to the independent sovereignty of Seigneurs: and the nobility became hereditary with their fiefs.

The period of the Capets, 987–1226.

3. The new Feudal Nobility reached its highest development and power in the third period, that of the Capets (987 to St. Louis, 1226). Charles the Great had understood how to preserve the unity of the State and strengthen the royal power. But under his successors the universal monarchy of the Franks parted into several independent States, and in the Frankish monarchy itself offices and fiefs became more independent. Charles the Bald was obliged[1] to recognise the hereditary principle for Countships and Fiefs of the empire in favour of the sons of vassals, and even of inferior vassals. Soon after the same right was admitted for collateral relatives. Only in the Church the idea of a personal nobility of office was maintained, while in the State it was transformed into a hereditary feudal nobility. Thus the rule of hereditary Seigneurs spread in various degrees and forms over the whole of France.

The higher Nobility.

Some of them had supreme authority (*obrigkeitliche Gewalt*) in all essential respects, and only recognised a very limited feudal authority over them on the part of the king (*oberlehensherrliche Gewalt*).

To this *haute noblesse* (*der hohe Adel*) belong Dukes, Counts, Viscounts, and Barons. Most of them were crown vassals, some of them were also vassals of dukes and counts,

[1] Convent. Carisiac. of 877, in *Mon. Germ. Hist. Legg.* p. 539. Cf. Waitz, *Verfassungsgeschichte*, iv. 227: 'Inheritance of fiefs was not generally recognised in France till much later. The kings resisted the principle till the second half of the eleventh century.' Cf. Luchaire, *Hist des Institutions Monarchiques de la France sous les premiers Capétiens*, ii. 19 ff.

only very few were allodial lords. They possessed *haute justice* (*die hohe Gerichtsbarkeit*), and stood at the head of the military constitution, which had now lost its earlier national character and become a feudal and knightly service. On the other hand, the military services they owed to the king were exactly fixed and defined. The king could not issue laws or levy taxes without their consent. In the same way they issued ordinances and imposed taxes in their domains with the consent of their vassals. Whoever lived on their domain (*Herrschaft*) had to swear loyalty (*fides*) to them, and the vassal had to swear fealty and homage (*foy et hommage*): he was their subject (*Unterthan*).

Political sovereignty was thus split up among a loose association of hereditary sovereignties based upon private rights.

The higher nobility was no longer a pre-eminent class of the people, nor did its essence lie in the fealty and services which it owed to the king. Its chief characteristic is that its members have become feudal princes and seigneurs. In fact it has attained sovereignty (*die Souveränität*)[8].

The lower nobility underwent similar changes. It had sprung from two sources, first the profession of knight, and second the offices of the court. At first it was their profession which made the position of the knights or retainers (*Dienstleute, Ministeriales*), who were bound in special loyalty to a lord: the knights were generally free, but the retainers were often of servile birth. The lower Nobility.

But the professional nobility in time became hereditary and feudal. The knights acquired feudal estates, which became hereditary in their family, the officials (*Dienstleute*) received court fiefs. As wealthy men (*riches oms*) they stood apart from the yeomen (*roturiers*), and as vassals they were brought near to their lords (*seigneurs*). As the lord sat at the king's table (*conviva regis*), so the knight sat

[8] Such is the old expression, *Beaumanoir* xxxiv. 41: 'Çascuns barons est *souvrains* en *sa baronnie*. Voirs est que li *rois* est *sourrains par desor tous*.'

at the table[6] of his lord. Their services in war and at court were attached to their estates, as the sovereign rights of the Seigneurs to their domains. They too had a limited territorial sovereignty (*Grundherrlichkeit*), and generally had an inferior and intermediate jurisdiction (*basse justice*) over the subjects of their feudal lords. Their class became more and more exclusive, and came to imply knightly birth and knightly education.

The new nobility, on the ground of their birth, were called *gentils hommes*. Certainly birth alone did not make a knight[7], but one who was not born of a knightly father—the condition of the mother did not matter—could not, as a rule, become a knight. The king alone could raise a man to the nobility[8]. At the same time the association of this nobility with the possession of a fief was at first so close that the yeoman (*roturier*) who bought a fief and lived on it became a *franc homme* in virtue of his estate, and if his grandson succeeded him in it, he became a *gentil homme*[9]. But the 'free knighthood' (*freies Ritterthum*) without fief, which grew up by the side of the other, held its position in virtue of birth, education, and profession.

This lower nobility, too, had many degrees, from the *Vavasseurs* or *Bas Sires* up to the *Viguiers* (vicarii), who were specially numerous in the South, and often had an intermediate jurisdiction; the *Châtelains*, some of whom came near to the Barons, and the *Vicomtes*, some of whom belonged to the Barons, while others had an inferior position in the feudal service of a Count. But throughout this confusing diversity of degrees and privileges the feudal principle is always fundamental.

4. The fourth period witnessed an entire transformation

[6] Loysel, *Inst. Coutum.* i. 1. 14: 'Nul ne doit seoir à la table du Baron s'il n'est Chevalier.'

[7] Cp. the French legal saying, 'Nul ne naît Chevalier.' Loysel, *Inst. Coutum.* i. 1.

[8] Loysel, ib. i. 1. 12: 'Nul ne peut anoblir que le Roy.' 13: 'Le moyen d'être anobli sans Lettres, est d'être fait Chevalier.'

[9] Schäffner, ii. p. 160.

of the nobility. First came a struggle for sovereignty between the Monarchy and Nobility. The kings were the representatives of the awakening spirit of national unity and the quickened consciousness of the State. In this struggle they were supported by the jurists, who maintained and finally brought into use the principles of Roman law. They found a powerful organ for their doctrines in the royal court of justice, the Parliament (*Parlement*). The nation, and chiefly the people of the towns, though seldom interfering, supported them indirectly. From St. Louis to the Revolution, 1226–1789.

A new system of royal officials, independent of the feudal tie, was gradually introduced. Paid troops of the king served the royal power without limit or reserve. The great fiefs of Dukes and Counts were one after another absorbed by the crown, sometimes by succession or contract, often by armed force, and the alienated sovereign rights were once more concentrated in the crown.

Thus the independent sovereignty of the nobility was broken. The victory of the King over the Seigneurs was completed by Louis XI (1461–1483).

The Nobles only saved remnants of their earlier territorial sovereignty (*Landeshoheit*): they became Governors (*Gouverneurs*) in certain provinces, but lost the position of territorial nobles. They had become merely a privileged class of subjects, whose distinctions and privileges more and more appeared to conflict with new ideas and beliefs. The later struggles of the King and the Nobility were of quite a different kind[10]. They were struggles of political and religious parties, sometimes of mere court parties, headed usually by nobles.

[10] De Tocqueville, *l'Ancien Régime*, has shown how the abolition of the political rights of the nobility, taken together with the continuance of their economical privileges, stirred up the national hatred against them. As long as they had judicial duties, and were especially occupied with public business, their freedom from taxation and their receipts from burdens on land and persons were intelligible. But after the royal officials had taken over the whole administrative and judicial business of the State, these economical privileges appeared unjust.

If the nobles wished to attain influence and power, they could only do so in the service of the king. They could not play any considerable part in the States-General, for it never took a fixed and regular form.

The feudal nobility becomes a court nobility.

The old feudal nobility was thus transformed into a mere nobility of the court, based rather on outward rank and honours than on political rights. Henri IV had commanded the nobles to live on their estates. Louis XIV brought them to the court to dazzle them into complete subjection[11]. In the first rank stood the Peers of France (*Pairs de France*), at first twelve in number, six ecclesiastical lords, six secular vassals of the crown; but they were afterwards increased by the addition of the royal princes and many other secular nobles. The Peerage was hereditary: it had the privilege of free access to the king and to the Parliament of Paris, before which alone it could be brought to trial. At the coronation the Peers carried the insignia of royalty.

Next to the Peers came the Dukes, Marquises, Counts, Barons, Viscounts, Châtelains, whose rank appeared in their titles and arms.

Last came the lower nobility of Squires and simple Gentlemen (*Gentilshommes*).

The old nobility had depended mainly on birth, though partly determined by the possession of seignorial rights (*Grundherrschaft*). But now a new nobility appeared by its side, taking its origin chiefly from royal grant. It consisted mainly of those who were nominated to the higher civil and military offices, and above all of the lawyers in the sovereign courts, the *noblesse de robe*. These posts were no longer hereditary, or attached to the soil, and hence this nobility constantly received new accessions. Connected with it was the nobility of the Doctors of law (*milites litterati, legales*), which, unlike all the rest, depended not on the royal favour, but on scientific eminence.

Noblesse de Lettres.

A lower element in the nobility consisted of the many

[11] De Parieu, *Polit.* 100 ff.

who were raised to it by letters patent, often for the sake of the fee, sometimes as a reward for services, not always the most honourable[12].

5. The brief and violent catastrophe of the French Revolution destroyed the whole system of nobility. It began with the fusion of the hitherto separate Estates in a general National Assembly. It went on to abolish the nobility as a distinction opposed to the democratic principle of equality[13]. Finally, it tried to exterminate the nobles with the help of the levelling guillotine. The Revolution.

6. When the passions of the Revolution had glutted themselves with the blood of eminent men, and its theory of equality had dulled its sharp edge on the iron of facts,—attempts were made, even in France, to restore the nobility in a new form on the levelled ruins of the past, but without lasting success. The most interesting was the attempt of Napoleon I. Napoleon, who saw in aristocracy at once an essential support and a limitation to monarchy. In the order of the Legion of Honour he created a sort of modern knighthood, which was open to every one who did eminent service to the State, but was essentially a personal and honorary distinction. He also thought of founding a higher hereditary Aristocracy, in which the surviving families of the old historic nobility should be united with the descendants of the new French marshals, ministers, and other high officials. One can see that Napoleon's idea was to combine the institutions of the early Roman Empire with the traditions of French history. Meanwhile he had hardly taken the first

[12] See Schäffner, vol. ii.

[13] Law of 25 June, 1790. Art. 1: 'La noblesse héréditaire est pour toujours abolie; en conséquence les titres de prince, de duc, de comte, etc.—ne seront pris par qui que ce soit, ni donnés à personne.'

Const. of Sept., 1791: 'La Constitution garantit comme droits naturels et civils (1) que *tous* les citoyens sont admissibles aux places et emplois, sans autre distinction que celle des vertus et des talens; (2) que toutes les contributions seront réparties entre tous les citoyens également, en proportion de leurs facultés.'

Const. of 1795, Art. 3: 'L'égalité n'admet aucune distinction de naissance, aucune hérédité de pouvoirs.'

step for the renewal of the nobility when his own fall came[14].

Louis XVIII.

Louis XVIII (1814) in his Peerage (*Pairie*) came nearer to the English pattern. But he failed to establish a political peerage. The constituents of the old Peerage had been too completely destroyed by the Revolution: the spirit of the people was so entirely given up to the principle of equal rights and free circulation of property, that any renewal of the nobility seemed like an attack on popular rights: many of the old nobility had borne arms against their country, and their new claims rested on the conquest of France by the foreign armies[15]. The old hatred was as strong as ever, and the aristocracy had not done any new services which would have reconciled the people to a political rehabilitation. The July Revolution of 1830 again abolished the hereditary peerage and the system of *Majorats*[b],

1830 and 1848.

[14] Napoléon, *Mém. de Sainte Hélène*, Las Casas, v. p. 4: 'Je le répète de nouveau, j'ai fait trop ou trop peu: j'aurais dû m'attacher l'émigration à sa rentrée; l'aristocratie m'eût facilement adoré; aussi bien il m'en fallait une; c'est le vrai, le seul soutien d'une monarchie, son modérateur, son levier, son point résistant; l'État sans elle est un vaisseau sans gouvernail (?), un vrai ballon dans les airs. Or, le bon de l'aristocratie, sa magie, est dans son ancienneté, dans le temps; et c'étaient les seules choses que je ne pusse pas créer. . . . La démocratie raisonnable se borne à ménager à tous l'égalité pour prétendre et pour obtenir. La vraie marche eût été d'employer les débris de l'aristocratie avec les formes et l'intention de la démocratie. Il fallait surtout recueillir les noms anciens, ceux de notre histoire. . . . J'avais dans mon portefeuille un projet qui m'eût rallié beaucoup de tout ce monde-là, et qui, après tout, n'eût été que juste. C'est que tout descendant d'ancien maréchal ou ministre, etc., etc., eût été apte, dans tous les temps, à se faire déclarer duc, en présentant la dotation requise. Tout fils de général, de gouverneur de province, etc., etc., eût pu en tout temps se faire reconnaître comte, et ainsi de suite. Ce qui eût avancé les uns, maintenu les espérances des autres, excité l'émulation de tous, et n'eût blessé l'orgueil de personne.' Cf. also v. p. 161, and Thiers, *Hist. du Consulat et de l'Empire*, viii. p. 116. Benjamin Constant, *De l'esprit de conquête*, part ii. ch. 2: 'L'hérédité s'introduit dans des siècles de simplicité et de conquête, mais on ne l'institue pas au milieu de siècles de civilisation. Elle peut alors se conserver mais non s'établir.' Cf. De Parieu, *Polit.*, 108.

[15] Hence, during the Hundred Days, an imperial decree was issued, 13 March, 1815: 'La noblesse est abolie. Les titres féodaux sont supprimés.'

[b] [For the institution of *Majorats*, see Thiers, *Hist. du Consulat et de l'Empire*, viii. p. 137.]

and the personal peerage for life, which followed it, was swept away by the storms of February, 1848. The Republic again pronounced against all titles and privileges of nobility [16].

The French nobility has never again been reorganised. The dignity of Senator, which Napoleon III adopted in his constitution, was a step towards it, but this attempt ended with the fall of the second empire. Since then the French nobility has only been so far restored that the old titles have been sanctioned [17] and secured against abuse. Napoleon III.

There are still aristocratic elements and tendencies among the people, but they have no chance of making way against the democratic spirit of the masses. The remains of the French nobility are now nothing more than a titular nobility, without special rights, and are kept up rather by family vanity than by public institutions [18].

[16] Fr. Const. of 1848, art. 10: 'Sont abolis à toujours tout titre nobiliaire, toute distinction de naissance, de classe ou de caste.'

[17] Decree of 24 Jan., 1852; Law of 28 May, 1858, and Decree of 8 Jan., 1859: instituting a special authority to control titles of nobility.

[18] De Parieu, *Polit.*, p. 112 ff.

CHAPTER XI.

B. *The English Nobility.*[a]

ENGLAND is almost the only modern European State where the nobility has held its place as a great national institution. This result is due to various causes.

Fusion of races.

1. The English nobility of the middle ages, like the French, comprised elements of two nationalities, English and Norman; but the connection between them was much closer than in the French nobility.

No doubt in the early centuries after the Conquest (1066) the Normans maintained a predominance over the Saxons, but their relations were much more intimate than those between the Romans and Franks in France.

The Saxon Eorls had been long distinguished from the free Ceorls as a national nobility: their education, their life, and their ideas were the same as those of the Norman nobles; and they maintained their old rights even against their new kings. The Conquest only served to strengthen their free spirit; and the increased zeal and vigour with which they maintained their rights gave to the nobility, as a whole, that spirit of political freedom which has made England great.

Power of the Crown.

2. On the other hand, one great effect of the Conquest was that the royal power, on which the unity and security of the State mainly rested, held its own against the nobles,

[a] [See the Articles on *Nobility* and *Peerage*, by Professor Freeman, in the *Encyclopædia Britannica*.]

and the sovereignty was not split up, as in France, among a number of great vassals.

The feudal system found its way into England, but it took a different form. The old idea that it was first introduced into England by the Normans has been exploded by more recent research. The old Saxon Thegns were to a large extent holders of fiefs, and were thereby bound to the kings by a tie of special loyalty and military service. But it remains true that the Norman rule gave a much more marked feudal character to the State as a whole. At the time of the Conquest feudalism was more developed in Normandy than in England, and the conquerors brought their ideas with them.

William the Conqueror himself established the principle that not only the tenants in chief, but also the sub-tenants and larger freeholders (*die grösseren Freisassen*), must swear the oath of feudal allegiance immediately to the king, so that in the sphere of military duty all subjects held immediately of the king (*reichsunmittelbar*)[1]. In the course of a century all landed estates were drawn into the feudal bond, and thus the phrase ran, 'The king is universal lord and original proprietor of all estates in his kingdom, and no one can occupy a part of them except by grant, direct or indirect, from the king.' Thus all landed property was made uniformly subservient to the State[1a]. The feudal sovereignty thus exercised by William was much more powerful than that of the French king of his day, whose sovereignty over the duke of Normandy, who as such was a French vassal, was but a slight one, more formal than real. William I.

Thus the Norman and Saxon nobles, though they held and exercised rights of jurisdiction and police over their

[1] *Legg. Wilh.* i. § 2: 'Statuimus etiam ut omnis liber homo foedere et sacramento affirmet quod intra et extra Angliam Wilhelmo regi fideles esse volunt, terras et honorem illius omni fidelitate cum eo servare et ante eum contra inimicos defendere.' [Stubbs, *Select Charters*, 80.]

[1a] Cf. Gneist, *Englische Verfassungsgeschichte*, p. 94 ff. Stubbs, *Const. Hist. of England*, i. 258 ff.

dependents, after the mediæval manner, still remained in a condition of real subjection to the king, and the unity of the State was not sacrificed to the barons.

3. But if the rights of the English nobility in this respect were narrow, their political rights, on the other hand, were all the more important. It is these which are the ground of their greatness and permanent significance.

Power of the Nobles in Parliament.

These political rights found their sphere in the great Councils, which early bore the modest name of Parliaments. In the Parliament the old Anglo-Saxon Witanagemot was revived in a new and nobler form, which gradually helped to unite the two races by the tie of common interests and fortunes. The earlier assemblies of the great vassals may have had no object beyond that of adding to the glory and dignity of the crown at the festivals of Easter, Whitsuntide, and Christmas. But gradually they gained a great political significance, and the most serious affairs of State came to be discussed and decided there, though at first without fixed rules or exact definition of their sphere. In the thirteenth century they took a more regular form. The Magna Charta of 1215, wrung from King John Lackland by the victorious nobles who had taken up arms in defence of their rights, enacted that 'Archbishops, Bishops, Abbots, Counts, and great Barons should be summoned to Parliament (*commune concilium regni*) individually, by royal letters (*sigillatim per litteras nostras*), and the other immediate vassals of the king by a general summons through the king's officers (*in generali per vicecomites et ballivos nostros*),' and that new taxes might not be levied without their consent.

Magna Charta.

The Upper and Lower House.

The first class, who as hereditary councillors of the king and holders of the highest offices of the court and kingdom had the chief management of public affairs, became in course of time the Upper House: the second class became a part of the Lower House. Both had at first a personal right to sit in the Council (*Reichsstandschaft*): but in the case of the second class it became a right to representation (*Representationsrecht*), shared with the knights, the inferior

vassals of the great vassals of the crown, and with the inhabitants of the cities and towns. The lords henceforth formed the higher aristocracy (*der hohe Adel*): while the rich bourgeoisie took their place by the side of the lower aristocracy of the Gentry.

The Nobility found its natural position in the State when the constitution of Parliament became complete at the end of the thirteenth and beginning of the fourteenth century[2]. In the reign of Henry III it seemed as if the Barons, under the leadership of the Earl of Leicester, would endanger the existence of the monarchy, and take the government into their own hands. But this was only a temporary encroachment, and soon afterwards the principle was once more established that the aristocracy were entitled to a definite influence on public affairs, and in particular to a share in legislation, but not to the exercise of the sovereign rights of government.

Their political power was further limited by the enlargement of Parliament, through the addition of representatives of the towns and cities, and by the fact that the English knights were elected to Parliament by free tenants (*libere tenentes*), not, as on the continent, nominated by their own order. The enlargement of Parliament.

The nobility proper consisted entirely of the Lords: it never became a dynastic and territorial nobility as in France and Germany, but remained an estate of the realm (*reichsständischer Adel*), exercising rights subject to the king and the law in the military and judicial system, as well as over their sub-tenants.

The Knights, that is to say, free men in possession of knights' fees, whether held of the king or of nobles, assumed an influential position. They held the first place in the militia, and, as justices of the peace, were entrusted with a power of police and administration of justice. The representatives of the county in parliament were chosen from Knights.

[2] See Part II. Book ii, chap. 3.

them. The association of their younger sons with the upper citizen class, and their parliamentary connection with the representatives of the towns, the '*honoratiores*,' gave rise to the essentially modern conception of the Gentry, all who by birth or office, education or property, are distinguished as *honoratiores* from the masses. Unlike the *gentilshommes* in France, they are not a rigidly exclusive order, but an elastic aristocracy, daily receiving new accessions and occasionally rejecting unworthy members[3].

Gentlemen.

Public spirit of the English nobility.

4. There is a further characteristic of the English nobility which deserves special notice, as it marks an honourable distinction between them and the nobility of France, and in the main of Germany also.

Even when the barons were the only political power in the State, they had in view something more than themselves and their own rights. They early felt their vocation as a national corporation to defend the rights and guard the freedom of the nation in the general interests of the public. Magna Charta contains many and important clauses to this effect. The political freedom of England is to a great extent their work. When this had been once firmly established, the higher aristocracy became a solid embankment against the streams of democracy: they exchanged the rôle of defenders of the national freedom for the less popular but equally useful task of defending the throne and established institutions (*Statsordnung*). Standing between the king and the mass of the people, not powerful enough to rule for themselves, and too independent to obey every impulse from below or every humour from above, they maintained the freedom and rights of both from encroachment and abuse.

[3] Blackstone, *Comm.* i. 12, quotes with approval a passage from Sir Thomas Smith. ['As for *gentlemen* they be made good cheap in this kingdom, for whosoever studieth the laws of the realm, who studieth in the Universities, who professeth the liberal sciences, and, to be short, who can live idly and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman.'] Cf. Gneist, *Englische Verfassungsgeschichte*, p. 621 ff. De Tocqueville, *Œuvres*, viii. p. 328.

The English nobility[b] have always taken an active and leading part in public duties. Their very education is permeated with the spirit of political freedom and personal independence. Party politics, their work as justices of the peace, their share in elections, in the county administration, and in juries, their voluntary societies and contributions for public purposes—all these forms of activity keep them in touch with the life of the people and train them in the duties of self-government and patriotic service[4].

The Peerage confined to one heir.

5. The hereditary principle in the case of the English lords became a rule of public law, though not in so absolute and exclusive a form as on the continent. At first the right of inheritance as well as the privilege of peerage was closely connected with occupation of the soil or with office. Peerage had a strictly territorial character. But later this connection was severed, and peerage was transmitted by inheritance as a personal dignity.

But this early association of the peerage with a definite estate, castle or office gave rise to the important principle that only one of the sons or relatives of the deceased lord could take his place in parliament. By the principle of primogeniture only one son became a lord, the others received a lower rank, and were excluded from the upper nobility. Not only are younger sons of a lord in law merely 'esquires,' but even the eldest son in his father's life-time is only called 'Lord' by courtesy. Thus, on the one hand, the dignity and wealth of the great families remained concentrated in one head, while on the other hand the easy transition from one class to another served to minimise the distinctions of birth[5].

[b] [Bluntschli here seems to be thinking chiefly of the county gentry, whom he regards as a lower nobility.]

[4] See Gneist, *op. cit.*, and De Tocqueville, *Œuvres*, viii.

[5] Macaulay, *Hist. of England*, i. p. 37: 'It had none of the invidious character of a caste. It was constantly receiving members from the people and constantly sending down members to mingle with the people. . . . The yeoman was not inclined to murmur at dignities to which his own children might rise. The grandee was not inclined to insult a class into which his own children must descend.'

Marriage.

6. Further, a Peer was not bound to marry into a noble family. The wife of a Lord is a Lady, although she may come from the citizen class. This principle has not lessened the dignity of the nobility, while it has done far more to secure it from attack than the caste-like principle of equality of birth, to which the German nobility cling so closely.

New Creations.

7. Finally, the Peerage was from time to time enlarged and enlivened by the creation of new peers. The privilege of creating them was reserved for the king as 'the source of all political honours[6].' He alone could add new members to the nobility and confer the rights of a peer upon them, with the title of Duke, Marquis, Earl, Viscount, or Baron. But in the nature of things this political dignity was only conferred on men who had distinguished themselves by their public services as generals or statesmen, and who possessed or now received enough property to satisfy the claims of their position. This constant supply of new and really aristocratic forces saved the English aristocracy from the danger of stagnation and incapacity. The ablest and most gifted men in the nation could thus look forward to raising themselves and their families by their public service to the sunny heights of political life. Thus, from 1700 to 1800, 34 dukes, 29 marquises, 109 earls, 85 viscounts, 248 barons were created. During the same time more than 500 baronetcies were conferred. At the present day rich citizens who buy large estates in the country count among the country gentry, though without a title of nobility[7].

If we now look as a whole at these characteristics of the English aristocracy, we need not wonder why it alone has preserved its existence undisputed, and continues to occupy a useful and brilliant place in the constitution, while in every continental country the aristocracy have either entirely disappeared, or maintain only a struggling and precarious existence.

[6] Blackstone, *Comm.*, i. 12.
[7] Gneist, *op. cit.*, p. 620. De Tocqueville, viii. 319.

CHAPTER XII.

C. *The German Nobility.* (1) *Princes.*

If we look at the history of the German nobility we find everywhere a number of distinguished families, raised above all other free men by military fame, by wealth or popular leadership, and in fact occupying a princely position. This ancient nobility of race (*Stammesadel*), often confined to a few families, was the foundation of the dynastic or princely nobility of the middle ages (*Hoher Adel*, *Herrenadel*, *Standesherren*).

The lower nobility of knighthood was a growth of the middle ages.

The position of the Princes, the highest secular class, was closely connected with the constitution of the Empire. The families whose heads had risen to the highest rank of independence and sovereignty were counted *hochfrei*, *sendbarfrei*, *semperfrei*. From the end of the twelfth century, only those secular lords counted as princes of the Empire who held at least a Countship in fief from the king, and were not vassals of any other temporal lord. But only the heads of these princely families were regarded as properly lords (*Herren*). The status was dormant in the case of the other members of the family: they were only companions (*Genossen*) of the princes and lords.

This high status in the Empire depended on:—

(*a*) The office of Prince (*Fürstenamt*), that is originally on the ducal military power, which was conferred along with a banner. Princes, secular and ecclesiastical.

By the side of the secular princes (Dukes, Margraves, and Counts-palatine), and sometimes taking precedence of them, stand the ecclesiastical princes of the Empire, carrying their sceptre. The former office had become hereditary, and was, as a rule, only bestowed on descendants of the higher nobility. The latter was not exclusively confined to princely houses: frequently clergy of knightly birth, or even learned citizens, were elected to it, and in rare cases even peasants' sons were raised to the episcopal throne.

Counts. (*b*) The office of Count (*Grafenamt*), which also became a hereditary and territorial rule. After the fall of the powerful tribal dukes (*Stammesherzoge*), and the partition of their territories among different princes, these dynasties of counts increased in dignity. Formally their position depended on the grant of the royal ban (*Königsbann*) by the king; in fact, it was a hereditary territorial lordship.

Barons. (*c*) Besides these there were a number of great allodial lordships, whose lords, by the grant of immunities and of seignorial rights, had obtained a sovereignty and jurisdiction like that of the counts—these were the Barons (*freie Herren*).

The families of the old tribal nobility, which had no position in the Empire, could not long remain members of the imperial nobility, and were merged in the other classes, mainly in that of the knights.

Their political rights. This nobility of the Empire (*Reichsadel*) is mainly distinguished by two political rights:—

(1) Territorial sovereignty (*Landeshoheit*).

(2) A seat in the imperial estates (*Reichsstandschaft*).

It was thus a ruling class in the fullest sense of the word, being sole ruler on its own domains, joint ruler in the Empire. This tendency to sovereignty was characteristic and powerful, and had a disastrous effect on the Empire. It led the most eminent families to sacrifice the majesty of the Empire to the claims of the Papacy, to weaken and cripple the German monarchy, completely break up the national unity, and make German territory subject to

foreigners. This crime against their country and the world is not compensated by the brilliance of their courts and palaces, nor by the ennobling works of art which flourished under their protection.

Their territorial lordship acquired in time the semblance of sovereignty, without real strength or security for the future. Only some of the great territorial princes were able to maintain some measure of separate political existence; most of them were too weak in resources and ability. Their power as an imperial estate was rarely exercised for the furtherance of German interests, the development of public rights, or the support of popular freedom: it was generally used to evade national duties, and extend the special powers of the members of the Empire.

Their selfish and exclusive spirit

The tendency to family exclusiveness was specially strong. This appears in the rigid requirement of equality of birth, in the prohibition of mésalliance (*Missheirath*), and in the extension of equal privileges to all children. The only form of marriage which was quite unexceptionable was where both parties were descended from *hochfrei* families. Even the marriage of a *hochfrei* man with a *mittelfrei* wife was regarded in many families as a mésalliance, compromising the equal birth of the children and the princely rights of the sons. The king could indeed remove the defect by raising the wife to a higher rank; or a family, in virtue of its autonomy, might adopt higher principles, or give its consent to a particular case of unequal marriage.

No German dynasty could keep quite pure, according to the strictest principles of equal birth. But in many cases morganatic marriages were concluded, with the express condition that the children should not inherit their father's rank: the same result followed in cases of undoubted mésalliance, especially where the wife came from the lower citizen or peasant, or even the serf class; when, according to the later electoral capitulations, even kings could not wipe out the stain.

Multiplication of titles.

At the time of the 'Mirrors[a]' the title of prince, count, and baron was only given to those who actually exercised the functions of prince or count, or occupied a barony[1]. But in time all sons of princes and counts bore and transmitted the title of their father. This multiplication of unreal titles, apparently with a view to the honour of families, only served to lower their dignity among the people, and to weaken them before the great territorial princes. In the same way the rigid maintenance of the principle of equality in marriage dried up the sources which should have renewed the nobility, and cut it off from the attachment of the people.

Decline.

Ever since the Thirty Years' War the dynastic nobility steadily declined, until its final collapse in this century. The decisive points in its history were these:—

1797 to 1803.

(*a*) The secularisation of the ecclesiastical principalities, for which the way was prepared by the treaties of peace between the French Republic and the German Empire at Campo Formio 1797, and Luneville 1801, and confirmed and concluded by the extraordinary decree of a diet of deputation (*Reichsdeputationshauptschluss*), Feb. 25, 1803.

The German estates of the ecclesiastical princes were used to compensate the secular princes for their losses on the left bank of the Rhine, and to furnish German territory for Italian princes who were driven out of Italy. Of the three ecclesiastical Electors, only the electoral prince of Mainz retained his position, and he was afterwards transferred as Prince Primate to Regensburg, and then to Aschaffenburg. The Grand Duke of Tuscany received the Archbishopric of Salzburg and the priorate of Berchtesgaden. The Bavarian Palatinate acquired the bishoprics of Würzburg, Bamberg, Freising, Augsburg, Passau, &c.; Prussia those of Hildesheim and Paderborn; Baden parts of those of Constanz, Strasburg, Speyer, Basel, &c.

[a] [Early in the thirteenth century Eike of Repgow made a collection of the laws in use in Saxony, calling it the 'Mirror of the Saxons' (*Sachsenspiegel*). The *Schwabenspiegel* appeared later in the century.]

[1] *Sachsenspiegel*, iii. 58. § 2. *Ib.*, i. 3. § 2. *Schwabenspiegel*, 5.

The secularisation was no doubt a breach of the historical rights of the Empire: but it was justified by the change in public opinion, which would no longer tolerate a political sovereignty of the clergy, and by the public needs of the population, which wanted secular government.

(*b*) The 'mediatisation' of a large number of secular princes and lords, by the Confederation of the Rhine, July 12, 1806. 1806.

Like the Act of secularisation it was mainly due to Napoleon I, and the ideas of the French Revolution: but at the same time it marked an advance in the political development of Germany, which had been hindered by the petty lords. The seventy-two 'mediatised' princes and lords lost their sovereignty, and became subjects of the great princes; but they still retained an inferior jurisdiction, and many privileges. Of their domains, thirteen fell to Bavaria, twenty-six to Würtemberg, nine to Baden, seven to Hesse, seven to Nassau, twelve to the Grand Duchy of Berg.

Later on, some of those who had survived were 'mediatised,' i. e. they became subjects of other German princes, e. g. the princes of Salm, Isenberg, and the Duke of Aremberg: some survived to the days of the Restoration, when they fell as dependents of Napoleon.

The dissolution of the German Empire, August 6, 1806, put an end to their rights as an Imperial estate (*Reichsstandschaft*).

(*c*) The German Confederation of June 8, 1815, revived the memory of the imperial privileges of these families by recognising them as equal in birth with those German princely houses which had become sovereign, and guaranteeing them certain honours and privileges, among others the right to sit in the first chamber of their country. The *Matricula* of the Confederation numbered at first forty-nine princes, forty-nine counts, and one baron: some of these families have since become extinct, others have lost their property. 1815.

The modern development of constitutional law in the different States was unfavourable to the patrimonial rights of these lords. They could not long maintain their special powers of jurisdiction and police in the face of laws which enforced legal equality and a centralised administration. After the Revolution of 1848 it became impossible; and the lords themselves resigned their separate lordship (*Sonderherrschaft*).

1815 to 1866. The number of thirty-four sovereign German princedoms, recognised by the Federal Act of 1815, has since been diminished by death, by resignation, and by deprivation. The princes of Hohenzollern-Hechingen and Hohenzollern-Sigmaringen voluntarily resigned their sovereign rights in favour of the King of Prussia, Dec. 7, 1849. The royal house of Hanover, the electoral house of Hesse, and the ducal house of Nassau, lost their sovereignty to Prussia by the war of 1866, and the establishment of the North-German Confederation. The present number of Princes in the German Empire, with territorial sovereignty, is twenty-two.

The new Aristocracy. But although the imperial nobility, in the old sense, has come to an end in Germany, there is still a higher aristocracy of distinguished families, composed partly of the old imperial families (*reichsständische Geschlechter*), partly of new families, which have been raised above the gentry by the public services of eminent men, such as Prince Bismarck and Count Moltke, or by princely favour. It is worth noticing that this high aristocracy, though its tone is rather conservative than liberal, has been distinguished by broad-minded views, and, so far from adopting a narrow and petty individualism, has shown complete sympathy with the national development and greatness of the German Empire.

CHAPTER XIII.

C. *The German Nobility.* (2) *Knights.*

MIDWAY between the old dynastic nobility and the simple freemen came those who had been raised out of the class of freemen into the class of the *mittelfrei*, as the 'Swabian Mirror' calls them. In the South of Germany they may be traced back to the time of the Frankish monarchy, but it was not till the fourteenth century that they were called noble and came to form a lower nobility (*niederer Adel*) above the simple freemen. The chief elements in this class were:— The Lower Nobility

(*a*) The freemen who were eligible to the office of assessor (*die schöffenbar Freien*[a]), originally owners of larger estates (three hides and upwards[1]), and chosen for assessors as the richer and more important of the freemen. In time the office, like all others, became hereditary, and they succeeded for a longer time than the mass of free peasants in keeping their estates free from burdens and subject to the jurisdiction of the counts instead of that of the bailiffs. Later on they were merged in the class of knights or of territorial lords.

(*b*) Vassals of the nobility; and after the rise of knighthood, knights with knight's fees[2].

[a] [For the meaning of *Schöffen* see Hallam, *Middle Ages*, Ch. ii. Pt. 2; Savigny, *Geschichte des römischen Rechts im Mittelalter*, i. ch. 4; and *infr.* Bk. vii. ch. 7.]

[1] *Sachsensp.* iii. 81. § 1; i. 2.

[2] *Sachsensp.* i. 3. § 2; *Schwabensp.* 5.

(*c*) Later on, many knights without fees, most of them descendants of vassals, who had received a knight's education; but also, as time went on, soldiers raised to knighthood by the emperor or his representatives.

(*d*) Numerous retainers (*Ministerialen*, *Edelknechte*) often sprung from the servile or half-free class, and even in the thirteenth century sharply distinguished from men of knightly birth. These rose by their offices and service at the court, their large property and grand style of living: at first they had no feudal rights, but they gradually rose to the level of the knights, and were absorbed in their order.

(*e*) The noble families (*die Geschlechter*, *Patrizier*) in many cities of the Empire, more rarely in provincial cities (*Landstädten*), originally descended from the assessor class or from knights, and distinguished by their share in city government.

becomes hereditary,

In the lower nobility, as well as the higher, the principle of inheritance tended to supersede considerations of landed estate, of knightly life, or of court service, and hence arose a large number of nobles, who owned no other title to nobility but an old family-tree. At the same time their attitude towards the freeman and peasant class became more exclusive at the very moment when the distinction between them was ceasing to have a real meaning. Thus the passion for grand titles was abundantly gratified. A large number of barons and even counts and princes issued from this order, getting their titles either by regular grant or by usurpation, but without any reality to correspond to them.

and exclusive.

In Germany a nobility was never developed out of the civil and military offices to the same extent as in France. The learned nobility of the *Doctores Juris* were the only exception to the hereditary principle. On the other hand, Germany showed the greatest readiness in adopting the French form of nobility by letters patent.

Their privileges.

The knights of the Empire, on their scattered domains, obtained a considerable degree of independence, but the

lower nobility, as a whole, had no territorial sovereignty and no place in the Imperial Estates. On the other hand, they had a share in feudal law, and had certain special privileges in religious foundations and benefices. Some of them exercised the jurisdiction of bailiffs and territorial lords, which they inherited in connection with definite domains.

Finally, they had the right to sit in the estates of their country (*Landstandschaft*), and formed the nobility of its court.

Decline, from the sixteenth century.

The power of this order rose to its highest after the thirteenth century, and survived till the middle of the sixteenth, when it began to decline before the irresistible revolution in economical, military, social and official relations. The Thirty Years' War helped to complete its destruction.

In the Germany of to-day the lower nobility, as a political institution, has become more completely disorganised than the imperial institution of the higher nobility. Many causes combined to undermine it: the feudal tie became weak, and States lost their feudal character and constitution, armies were revolutionised, the official class ceased to be hereditary, citizen families rose to high places, the old German Empire fell to pieces, and representative institutions were developed. More recently, too, changes from above and from below have abolished these privileges, sometimes singly, sometimes in the mass.

In Germany, as well as in France, the third estate would not tolerate the privileges of the nobility, and disputed its very existence. The unlimited extension of nobility to all descendants brought the claims of the nobility into glaring contrast with the facts on which they were founded, and the inconsistency was heightened, and the confusion increased, by comparison with the upper citizen class. If the inferior princes of the Empire could not resist the land-hunger of the princes of the Confederation of the Rhine, still less 1815.
could the knights of the Empire. Their estates were incorporated in the territories of princes. The Confederation

of 1815 tried to preserve a privileged position for their families, and to secure them autonomy, a seat in the provincial estates, rights of jurisdiction and patronage, forest privileges, and a privileged position in the courts. But this tinkering was ineffectual. To the modern conception of public law, patrimonial jurisdiction was as intolerable as freedom from taxation.

Speaking generally, the so-called lower nobility in Germany has no longer any special rights in law. As a political and imperial institution it has ceased to exist. What remnants of its old glory, besides its name and arms, it retains and exercises on occasion, have only an antiquarian interest.

The German nobility as it is.

But still the territorial nobles, and in less degree the nobles of the court, though without landed property, occupy an important place in society, and indirectly exercise a considerable influence on policy and on official appointments. The appointments to the higher military posts, and to offices at court and in the diplomatic service, are mainly, though not necessarily, made from this class.

The merely titular nobility have gradually become merged by marriage and occupation with the upper citizen class, both in social and political life. The German nobility of Knights have not a patriotic and national history like the English aristocracy. A large part of the territorial nobility offered a long and stubborn resistance to modern ideas and reforms. Many of these nobles, in their romantic enthusiasm for mediæval conditions, were readier to serve territorial absolutism than the freedom of the people. Hence the German nobility are not so popular as the English; like the French legitimist nobility, they are often regarded with distrust and hatred by the masses. Still they have produced many enlightened men and distinguished patriots. They have given the army its best leaders, and in the great crisis of the national development, the leaders in the struggle for

Its Reform.

reform have come from among the nobility. The question of a reform of the German nobility, as an institution, has been much discussed in recent times; but the best oppor-

tunity for it, the period from 1852 to 1860, was passed over. The attempts at reform only showed how little influence the friends of reform had with the members of their order, and how opposed the mass of them were to any thorough and effective change.

With the foundation of the German Empire the possibility arises of a reconstituted and national aristocracy, in which the lifeless and unfruitful constituents of the old nobility should be ruthlessly set aside, and the sounder elements retained, to be blended with other and more modern aristocratic tendencies. An aristocracy, powerful, independent and educated, is a necessity of life to a great people like the Germans, and such a counterpoise of quality as against quantity is especially necessary when the weight of the democratic masses is so heavy in the balance. In a purified aristocracy which should thus form a middle estate (*aristokratischer Mittelstand*) the hereditary principle would not have the sole nor unlimited sway. Personal nobility (*Individualadel*) demands recognition as well as nobility of race (*Rasseadel*): a noble race separated from its foundations in Society may in time lose its nobility.

Notes.—1. Riehl, in his book on *die bürgerliche Gesellschaft* (1854), has given a lively picture of the social significance of the German aristocracy. The social position which it still occupies has a value of its own, but without political organisation it cannot be permanent or effective. Classes (*Stände*) which are merely social groups, are only the foundation of classes in the organic and political sense.

2. In the *Deutsches Statswörterbuch* (i. p. 30 ff., and p. 58 ff.) I have based my proposals for reform on the distinction between passive (*ruhender Adel*) and active nobility (*wirklicher Adel*). The former is conferred by birth, and is only potential: the latter starts with personal preeminence, in which the potential nobility becomes actual. I have since made the pathetic discovery that my idea was anticipated two generations ago by Justus Möser (*Patriot. Phantasien*, iv. 248), only to be disregarded. See my *Geschichte der Statswissenschaft*, p. 423.

CHAPTER XIV.

III. The Citizens.

The Citizen class (*der Bürgerstand*) in Europe, though later in its rise than the lower nobility, became a national estate with its own political rights as early as the middle ages. Its roots are to be found in the old hereditary class of Freemen (*die Gemeinfreien*), who originally formed the tribe proper in the various German tribes and nations. But it was only in the precincts of the towns, and under the protection of the law and constitution of the towns, that it could attain to a free growth.

Tendency to Serfdom in the country.

The middle ages, generally, were not favourable to popular freedom. The hierarchical, dynastic, aristocratic classes were in the ascendant, and in the greater part of Europe the free proprietors of the soil were subject to the grasping dominion of the feudal nobility and the bailiffs (*Vogteiherren*).

The strong legislation of Charles the Great checked the worst oppressions, but could not prevent the advance of the evil. Under the Frankish monarchy a very large part of the peasant population, which belonged by free birth to the genuine German tribes, by settling on royal or ecclesiastical estates, or on the lands of the territorial nobles, and cultivating land which was not their own property, or by making over their property from pious motives or necessity as gifts to churches and monasteries, and receiving them back as tenants, fell into a condition of manorial servitude (*Hofhörigkeit*), which made them little better

than slaves, and deprived them of many of their political privileges.

In time even the small estates, which had remained the property of their free cultivators, were unable to escape the jurisdiction of the bailiffs, and the burdens which the ruling aristocracy laid on them. The change in the organisation of the army, from the old basis of knightly and feudal service to that of mercenary troops, deprived the free peasants of their military efficiency and dignity. They were loaded, often arbitrarily, with taxes of every form and for every sort of pretext: and in the courts too, and still more in the political corporations of the country, they lost the place which the old German constitution had secured them.

Even the free proprietors of the soil, as people of the bailiwick (*Vogteileute*), gradually dropped to the level of servile peasants, and both were classed together under the common name of the peasantry (*Bauernschaft*).

Thus the political rights of the peasants were for the most part much curtailed, and the old hereditary class (*Erbstand*) was transformed into a professional class (*Berufsstand*). Only some of the free peasants, generally the larger owners of land, rose into the new class of Knights. There were exceptions. Individual communities of free men were able, under favourable conditions, to preserve their free ownership as well as their higher political privileges from the dangers which threatened them. One of the most notable examples of this is the village-community of Schwyz, which gave the impulse as well as the name to Swiss freedom.

Freedom in the Towns.

In the country then the old freedom was suppressed, but meanwhile the towns became the home of a new civic freedom. The history of the towns had a decisive influence on the development of the modern idea of freedom and citizenship. Both ideas were civic (*städtisch*) before they became national (*Statsbegriffe*). Centuries were needed to develop fully the idea of citizenship in a town, and centuries more before it was enlarged to citizenship in a State.

At first the privileged classes, with their variety and separation, the outcome of mingled Romance and Teutonic elements, were reflected in the life of the towns. The variety was greatest where a large population was enclosed in a narrow space.

Population of the Towns.

Often within the circle of the same walls were found:—

1. Ecclesiastical princes with their courtly state and special rights of sovereignty, bishops and abbots.

2. The lower ecclesiastics of all sorts and degrees.

3. Secular nobles of high rank, e. g. royal counts or high barons, the *Capitanei* of Italy, who resided in the country and only made short stays in the towns unless they possessed castles there.

4. Knightly families, often owning fiefs in the country.

5. Retainers (*Ministerialen*) of the ecclesiastical and secular lords.

6. *Mittelfreie.*

(*a*) In the Romance towns of Italy and France, frequently the descendants of the Roman *decuriones*, who possessed landed property in the town.

Or (*b*) German freemen who had settled on their own land in the town, and were distinguished by property and political position.

7. Simple freemen (*Gemeinfreie*) still owning land in the town.

8. Men free in person (*persönlich Freie*), but living on the estates of lords in the town, and therefore subject to manorial law, e. g. to an abbacy.

9. A mass of serfs of different lords, in the most various conditions, (*a*) some living independently as artisans;

(*b*) others in dependence on a household as messengers and servants, &c.

Growth of the Citizen Class.

The union of all these elements of the mediæval system within one town, necessarily tended in time to break down the separation between them and to produce a new combination. Community of life, of interests, and of fortune, as well as party struggles, brought them into closer con-

tact, or gave rise to new differences not determined by birth.

The civic constitution brought into being new corporations and councils, in which the various classes were merged in a new unity. This process varied with the conditions of different times and places, but was essentially the same. The most important stages in this development were the following:—

Rise of Councils in Lombardy, &c.

1. First in this citizenship of the towns came the distinguished families of Knights, Retainers, and *Mittelfreie*, who, as *Consules* in the Council, strove for independence and limited the lordship of the old lords of the town (*Stadtherren*). This nucleus was enlarged by *gemeinfrei* elements, and new oppositions arose between the old aristocratic families and the young and pushing societies of free citizens. Thus Milan, about the middle of the eleventh century, saw the rise of the *Motta*, a political society of doctors of law, physicians, bankers, merchants, and even men of knightly family, who did not live the life of knights: later, under the name *popolo grasso* (populares), they opposed the noble *Capitanei* and *Valvassores*, and in the twelfth century took their place beside them in the Great Council (*Concilium Generale*)[1], forming the common council of the town.

The rise of a civic authority in the *Consuls* was the first decisive step towards the fusion of the higher classes in the city: next came, as a rule, the formation of Great Councils and the name of Communes (*Gemeinden*): last came the Guilds (*Zünfte*). And thus by degrees the older and narrower societies were included in a wider circle of citizenship.

This development was first seen in Lombardy, where the Teutonic tendency to corporate life and independence was blended with memories of ancient Rome. From there the movement passed to the towns of Southern France, during the twelfth and thirteenth centuries. There it found its

[1] Savigny, *Geschichte des röm. Rechts im Mittelalter*, iii. ch. xix; Leo, *Geschichte von Italien*, i. p. 399; Hegel, *Städteverf. in Italien*, vol. ii. p. 213 ff.

main support in the remains of the old free municipal citizenship (which had fallen lower in France than in Lombardy), represented by elected *Prudhommes*.

Communes in France.

2. A more decidedly democratic character and corporate form is found in the sworn confederations of citizens in the communes, which in the North of France about this time engaged in bloody struggles with the lords of the towns.

Guild-Societies.

Here we find new elements of citizenship, especially in the Guild-society (*Gildonia*, *Conjuratio*, *Fraternitas*)[2]. Entrance into this, accompanied by an oath of obedience to the statutes, was the only road to citizenship in a commune. Thus civic freedom and civic rights were disconnected from mere birth or ownership of land, and stress was laid instead on corporate union. The feudal principle and the old Teutonic principle of privilege gave way to a new and personal principle.

The personal tie supersedes the feudal.

Further, the constitution of the commune was favourable to the extension of freedom and citizen rights to the lower strata of the town population. The mass of artisans, who had freed themselves from serfdom, found entrance into the society, and the principle was established that the serf who had lived in the town a year and a day unclaimed and unpursued by his lord became a free man. Town-law throughout Europe[3] bears witness to the important principle that 'the air of the town makes a man free.' It is true that the exaggerations and excesses of democracy in the towns often led to reactions. The kings who had helped to free the towns from the lordship of their seigneurs, now took occasion through their officers to take the government into their own hands and make it severe. In the same way the Lombard towns, for the most part, lost their self-government at the beginning of the fourteenth century, and fell into the power of individual princes. There,

Enfranchisement of serfs.

[2] Cf. Thierry, *Lettre XIV, sur l'histoire de France*, and Schäffner, *Rechtsgeschichte*, ii. p. 554 ff.

[3] For Germany see Gaupp and Gengler, *Deutsche Stadtrechte des Mittelalters*.

in the thirteenth century, the new citizen body of the *Popolo*, composed largely of the lower elements of the town population, under its democratic captains (*Capitani*), had begun the struggle for dominion with the city nobles, and had frequently overpowered and expelled them.

Besides the towns with a consular and a communal constitution, there were many towns in France which had remained more dependent on their lords, and were ruled by provosts (*prévôts*), often very arbitrarily. However, even in these towns the burdens of servitude were removed or much lightened, and the idea was developed of the *Bourgeoisie* as a free class, into which a man could enter by settlement in the town, or perhaps by royal grant of citizen rights[4].

Citizenship in Germany.

3. In Germany, too, the different meanings of the word citizen (*Bürger*) indicate the various stages in the development of the idea.

Free householders.

In the thirteenth century it was still the practice, as it was earlier in Italy and France, to distinguish Knights and Citizens (*milites et burgenses*), and to understand by the latter those freemen who belonged to the town society, and were eligible for its council, but who did not live as knights. This citizen body had its foundation in the free householders of the town, who usually shared with the families of knightly birth the offices of assessor and councillor in the town.

These two bodies, the knights (including the *Ministerialen*) and the citizens combined, were regarded as the citizens with full rights, or as the 'families' (*Geschlechter*), and opposed to the artisans and other inhabitants of the town.

Merchants.

After the middle of the thirteenth century, the time of the great town-federations (*Städtebünde*) for the protection of trade, it appears that the merchants in many German towns were acknowledged as citizens and obtained the right of representation in its Council, on the ground of personal freedom, apart from ownership of land.

[4] Schäffner, *op. cit.*, p. 590.

Thus the idea of citizenship was to some extent divorced from connection with the soil, and more significance than before was given to profession and personal association. This tendency received new strength when it became usual, in the early fourteenth century, for the artisans in their companies to be incorporated as a new constituent in the citizen body. The word citizen (*Bürger*) had thus gained a wider meaning. Henceforth it was regularly applied to all who shared in the life of the town and its corporations. Servitude, so far as concerned town citizenship, was abolished, distinctions of birth were essentially modified and softened, feudal law made way for the town law (*Stadtrecht*), which was common and personal, and all citizens as such were brought into immediate relation with the town to which they belonged.

Artisans.

Citizenship of personal freedom.

This citizenship of personal freedom (*das persönlich-freie Stadtbürgerthum*), which enjoyed now larger and now smaller powers of self-government, was limited to the sphere of town interests. The details of the different constitutions varied with the history and circumstances of the town.

Provincial and Imperial Towns.

Some towns were subject to the territorial sovereignty of princes, and were hence called provincial towns (*Landstädte*). Others acquired royal rights for their councillors, and became territorial lords (*Landesherren*) to the surrounding villages and to the lordships which they acquired. In view of their immediate relation to the emperor and the Empire they were called imperial towns (*Reichsstädte*).

Decline of the Towns.

In the sixteenth century the German towns were still wealthy, flourishing, cultivated. The buildings of the period still maintain the reputation which they had in Machiavelli's[a] days. But the Thirty Years' War destroyed the power and prosperity of the towns, and they fell into a miserably low condition, from which it took them more

[a] [Machiavelli, *Ritratti delle cose dell'Alamagna*: 'Della potenza dell' Alamagna alcun non debbe dubitare, perchè abbonda di uomini, di ricchezze, e di armi. . . . Ma vengiamo alle comunitadi franche ed Imperiali, che sono il nervo di quella provincia, dove sono danari e l'ordine.']

than a century of suffering and struggle to recover. Provincial towns lost their position in the provincial estates, while imperial towns scarcely maintained a shadow of independence. The towns anxiously cut themselves off from the country: they were impoverished and oppressed, and became the victims of a narrow and petty provincialism.

4. The following are the characteristic features of the mediæval citizen class:— Characteristics of the mediæval Citizen Class.

(*a*) It does not, like the Clergy and the Nobility, form a privileged order, but a national class (*einen ordentlichen Regel- und Volksstand*). It is distinguished from the peasants by its relation to the town, by its culture, its freedom, and its law.

(*b*) In spite of differences of origin and of occupation the citizen body is felt to be a united and homogeneous class. It is the guardian of civic freedom, and of the equality of all before the law. It lives by the same town laws, and has the independent ordering of its constitution. The citizens are sons of the town, and share in its common life. The political and social life of the town are closely connected.

(*c*) But further, the citizen class obtained a political position and significance which went beyond the precincts of a single town, and embraced the citizens of many towns in one corporate class. This new development found expression in the organisation of the mediæval Estates, provincial and imperial. From the middle of the thirteenth century, the citizens of the English towns, at first separately from the Knights, afterwards along with them, obtained the right of representation in the national Parliament. In France, the representatives of the bourgeoisie formed the 'third estate' (*tiers état*), summoned at first separately from time to time, but from the beginning of the fourteenth century as part of the Estates General (*États généraux*). The Third Estate.

In Germany, the 'benches of the towns' in the Imperial Diets (*Reichstage*) after the elevation of Rudolf of Hapsburg in some measure represented the citizen class; and in the Provincial Diets (*Landtage*) the towns received a

seat and vote, as a third estate, by the side of the nobility and clergy.

Citizenship in the State.

5. Finally, the new ideas which had taken form in the citizen class of the towns were extended to the wider field of the whole nation; the citizenship of the town gave birth to the modern citizenship of the State.

CHAPTER XV.

IV. The Peasants.

If the old class of freemen lost ground in the middle ages, the servile class gained: the depression of the freeman and the rise of the serf tended to a mingling of the two classes. A small part of the servile class as *Ministerialen* rose above the freemen and became part of the inferior nobility. Their service at court brought them into close connection with princes, and gave them the education and manners of a court: and this, with their rich estates, in time gave them a place by the side of the knightly nobility. Rise of the serf-class.

Another and larger part settled in the towns, where they enriched themselves by trade, and acquired personal and civic freedom. The Italian towns deserve the credit of having been the first to free their serfs. The town of Bologna, always a champion of freedom, on the proposal of the Podestà Accursius de Sorrecina, generously resolved to purchase the freedom of all serfs in its domain, and to declare serfdom at an end [1]. Enfranchisement.

The development of civic life also elevated the Artisan (*Handwerker*) class, who had hitherto held a low place, especially in Teutonic Europe, and had chiefly consisted of serfs. From Italy, where free citizenship blossomed early, the *Scholae* spread to France, where, under Teutonic influence, they took the corporate form of *Ministeria* (*mestiers*)

[1] Laurent, *Histoire du droit des gens*, vii. p. 529. Florence followed this noble example in 1288; Sugenheim, *Geschichte der Aufhebung der Leibeigenschaft*, 1861, p. 202 ff.

Guilds in France and Germany.

and Guilds, and were finally transplanted to Germany. Their effect was to strengthen the rights of their members and to raise the dignity of their masters. The systematic education and gradual development of the artisan class, their progress in technical skill and in wealth, their new privilege of carrying arms under the banner of their corporation or their guild, their permanent connection with the interests and prosperity of the town, all tended to awaken in the artisans a sense of their importance and their claims. Many were serfs, but now obtained freedom by purchase or by revolt. They could no longer be deprived of the rights of citizens of their town.

Serfdom in the country.

In the country the road to freedom was more difficult. In many places it was a principle that 'the air makes a serf' (*die Luft macht hörig*). It was an exception for peasant serfs to become completely free, but by slow degrees they generally acquired a personal freedom which, though heavily burdened and politically insignificant, was secured by the protection of the law, and tended constantly to extend. They united with the free peasants to form one professional class with equal rights.

Enfranchisement.

The detailed relations of serfdom to freedom, and the transitions from one to the other, were very various. The elevation of the serfs, like the abolition of slavery, was largely due to the influence of the Church. Where churches or conventual establishments were lords of the manor, they generally led the way by giving definite rights and exemptions to their serfs, and thus the dependents of religious houses (*die Gotteshausleute*) were the first to approach the condition of free peasants. The example was followed by the kings. The Carolings bestowed freedom on the Fiscalini, and Louis X[2], enfranchising the serfs on the royal

[2] Ordonn. i. 583: 'Comme selonc le droit de nature chacun doit naistre *franc* et par aucuns usages—moult de personnes de nostre commune peuple soient encheües en lieu de servitudes :—Nous considerants que Nostre Royaume est dit et nommé le Royaume de Francs, et voullant que la chose en vérité soit accordant au nom—ordenons, que

domains in 1315, declared that he was fulfilling his duty as king of France.

The same spirit which made the sovereign rights of the great barons hereditary fiefs attached to the soil, and which gave to vassals as against their lords secure and permanent rights in their benefices, tended also to confirm the rights of the peasant serfs of the manor (*hofhörige Bauern*) to their holdings, and gave rise to inheritance subject to manorial law (*hofrechtliche Erbe*) and to a peculiar system of patrimonial jurisdiction, in which the peasants took part under the leadership of their Maires or Meyer (*villici majores*). The peasants acquire private rights.

The position of the French *Serfs* and *Vilains* was, as the name implies, less favoured than that of the German *Hofleute* and *Grundholden*; but the freedom of the latter was later in its development, and in France the higher classes of privileged peasants, the *Coutumiers* and *Roturiers*, and the *Ostes* (*Hospites*), came near to the position of freemen. France.

In England, on the other hand, the serf population, after the Black Death (1348-9), acquired personal freedom, but without land: and thus arose a class of free labourers instead of free peasants[2]. England.

This modified freedom of the peasants was generally limited to the sphere of private law, and of the communal and judicial constitution. In combination with the free peasants who had become subject to the hereditary lordship of bailiffs, and whose holdings had to bear various perpetual

generaument par tout nostre Royaume de tant comme il peut appartenir à nous—telles servitudes soient rameneés à franchises—à bonnes et convenables conditions—de tant comme il peut toucher nous.' Cf. Schäffner, *Franz. Rechtsgesch.* i. 523. Still earlier the Count of Valois, brother to King Philip the Fair, had enfranchised the serfs on his domain on the ground of the natural freedom of man; Laurent, *op. cit.*, vii. 528; Sugenheim, *Geschichte der Aufhebung der Leibeigenschaft*, p. 130 foll.

[2] Seebohm, *On International Reform*, p. 26 foll. The abolition of serfdom began in England in the course of the thirteenth century. Many of the liberated serfs acquired the position of copyholders. Sugenheim, *op. cit.*, p. 289; Gneist, p. 444 f. [See also Seebohm, *The Black Death*, in *Fortnightly Review*, vol. ii. 1865, and J. E. Thorold Rogers, *Six Centuries of Work and Wages*, vol. i. ch. 8.]

burdens, to the profit of their lord, they formed the so-called Peasant Class (*Bauernstand*).

The peasants did not become a political estate in the full sense, except in a few countries: in Scandinavia, where they had fortunately retained their old common freedom (*Gemeinfreiheit*) and the old constitution; in the Tyrol, where they were summoned by the princes to the provincial diets (*Landtage*); in Switzerland, where they formed free peasant republics.

In most countries they were treated as a subject class, with no claim to political, least of all to representative rights, and as marked out by nature to bear public burdens. They were essentially an 'economical' class (*ein wirthschaftlicher Stand*), not like the citizens of the towns an 'educational' class (*ein Culturstand*).

The German Peasant War.

The great Peasant War of the sixteenth century was a strong but vain effort of the German peasants to break the heavy yoke of their lords. When we now read the Twelve Articles summing up the demands of the peasants, and remember the violent indignation which they aroused in the educated classes and in the ruling aristocracy of that day, we may notice with some satisfaction that in our century the peasant class have everywhere obtained, without a struggle, as rights of men and citizens, more than they then dared to ask.

But it was only gradually that men accustomed themselves to the idea that peasants were not merely a subject race, only fit to be enlisted and taxed at will. The English constitution once more showed its regard for popular freedom when it granted to the Yeomen (*probi et legales homines*), who drew a moderate income from their holdings, the right to take part in county elections for the House of Commons.

Political rights.

But it was not till lately that the blessing of full personal freedom and political rights was generally extended to all classes. The philosophy of the eighteenth century, by winning recognition for the idea of the natural rights of men, gave the intellectual impulse to this great advance. In Ger-

many, King Frederick I of Prussia led the way by abolishing serfdom on the royal domains in 1702: the emancipation of other serfs was encouraged and extended by the laws of Frederick II, and the example was followed by the Emperor Joseph II, in 1782, for Germany and Austria, and by Charles Frederick of Baden, in 1783. Meantime most German States held back, until the enthusiastic declaration of the 4th of August, 1789, and the proclamation of the 'rights of man' by the French National Assembly produced its effect on civilised Europe. The emancipation of serfs and dependent classes was recognised as a universal duty and an irresistible demand of the new age, and was carried out in Western Europe in the first half of this century, and since then in Eastern Europe. At the same time, or even afterwards, political citizen rights (*Statsbürgerrecht*) were extended to the peasants as well as to the citizens of the towns.

CHAPTER XVI.

V. Slavery and its Abolition.

The Slave enters the family or nation, to which he is subject, as a foreigner. Widely as slavery was spread in antiquity, I know of no nation which would have regarded it as a national class (*ein nationaler Stand*). In this we have at once a proof that slavery is not a necessity of human nature.

Aristotle on Slavery.

Aristotle (*Pol.* i. 4–6) has exercised much subtlety to prove that some men are masters by nature, others slaves by nature. But his argument, so far as it is true, only establishes the necessity of a class occupied in service, not of a slave-class without rights. Doubtless the man of higher talents, if he is to fulfil his function, does require what Aristotle calls 'living instruments' (ἔμψυχα ὄργανα), and doubtless there are men specially adapted by nature for bodily activity, who need the commanding guidance of a master if they are to fulfil their vocation. But this only proves that there is a mutual need which unites master and servant, master and journeyman, farmer and labourer, manufacturer and mechanic: it does not prove that the relation of the employed to the employer is to be compared to that of the domestic animals to their owners, nor that workmen must surrender individual freedom and human personality, and become mere things, mere instruments of an appointed master,—that is to say, become slaves. Man is by nature a person: he cannot become a thing, that is, a slave. The Roman jurists, in their theory of

Law, have applied the notion of property to slaves with a severity which was remarkable even in antiquity, representing them throughout as beings without rights, as mere things: but even they felt that slavery was against nature, and had only been introduced by the common usage of nations[1]. They therefore explained manumission as the restoration of a natural right[2]. Roman Law.

But in spite of this knowledge, Roman jurisprudence, for more than a thousand years, applied the principle of property to slaves with rigid consistency. The imperial ordinances against excessive or groundless severity of masters against slaves[3], acted like the present laws against cruelty to animals, in preventing the worst cruelties, but did not affect the principle: and the slave, as before, not only had no property, but had not even the right of marriage or kinship.

The German law recognised with equal clearness, to use the strong words of the author of the *Sachsenspiegel*[4], that all slavery had arisen from compulsion, capture, and unjust force, and that what was now given out as right was only custom, ancient but unjust. German Law.

The Teutonic nations always recognised certain rights in their serfs[5]. Their rights of property and of family were in-

[1] Florentinus, in Digest I, Tit. 5, *de Statu hominum:* 'Servitus est constitutio juris gentium, qua quis dominio alieno *contra naturam* subjicitur.'

[2] Ulpianus, in Dig. I, Tit. 1, *de Just. et Jure:* ('Manumissio) a jure gentium originem sumsit, utpote quum jure naturali *omnes liberi nascerentur*, nec esset nota manumissio, quum servitus esset incognita; sed posteaquam jure gentium servitus invasit, secutum est beneficium manumissionis.'

[3] [Justinian, *Inst.*, i. 8]. 'Sed hoc tempore nullis hominibus, qui sub imperio nostro sunt, licet supra modum et sine causa legibus cognita in servos suos saevire.' Gaius, i. § 53.

[4] *Sachsenspiegel*, iii. Art. 42. § 3: 'An minen sinnen ne kan ik is nicht upgenemen ne der warheit, *dat iemen des anderen sole sin*, ok ne hebbe wie's nen orkünde.' § 6: 'Na rechter warheit so hevet egenscap begin von gedvange unde von vengnisse unde von unrechter walt, die man von aldere in unrechte wonheit getogen hevet unde nu vore recht hebben wil.'

[5] Occasionally, in German law, we find serfs put on the level of domestic animals, but this is certainly not of the essence of the older relation. Cf. Tacitus, [*Germ.*, 25: 'Ceteris servis non in nostrum

complete and insufficiently guarded, being in fact dependent on the good-will of their lord: but the germ of their later enfranchisement was stronger than in Roman law. The personality of the German slave was never completely lost, and so it was possible to improve his condition.

Slavery passes into Serfdom.

Slavery in Western Europe disappeared to a great extent in the middle ages, by passing into the milder form of serfdom (*Hörigkeit*). Its last remains were only banished with the final abolition of serfdom, at the end of the eighteenth and beginning of the nineteenth century [6].

Christianity.

The earlier and gradual process, as well as the more thorough enfranchisement of recent times, may be regarded as due in part to Christianity, which, without violently attacking the positive laws of slavery, destroyed its intellectual basis. Property in man was incompatible with the belief that all men are the children of God, and brethren of one another. But the change is due still more to the Teutonic sense of law and freedom, and to the progressive spirit of humanity.

The Teutonic spirit.

Russia.

The history of slavery in Russia is peculiar. In early times there existed a sort of personal bondage (*Knechtschaft*), but in the sixteenth century the mass of the peasants were free. The wide estates required a large number of labourers, and the territorial lords found it to their interest to attach the peasants to their estates by various favours, and so put an end to the free movement and constant change of dwelling which their old nomadic impulse still prompted. But the peasants did not become serfs until the financial and military needs of the State bound them still faster to the soil, and put them at the mercy of their lords. Nowhere did the freedom of peasants, in the seventeenth century, suffer so severely as in Russia. Serfs (*Knechte*) and peasants were involved in a common servitude, which put their persons and property

morem, descriptis per familiam ministeriis utuntur. Suam quisque sedem, suos penates regit. Frumenti modum dominus aut pecoris aut vestis *ut colono* injungit: et servus hactenus paret.']

[6] See above, Ch. xv.

almost entirely at the disposal of their lord. But in Russia, too, the new age brought alleviation, and in our days enfranchisement. The work of emancipation carried out by the Czar Alexander II, by the law of February 19, 1861, in spite of the resistance of many nobles, was the beginning of a new period of personal freedom in Russia [7].

American Slavery.

Thus Europe was gradually purified of the primeval curse of slavery. But it found a new soil, and in some respects a more vicious development, in the new world. The American civil war of 1861 to 1865 was the fearful retribution for this outrage upon the spirit of humanity.

Negro slavery was less objectionable in this respect—that the slave was not like the slave of Greece and Rome, of the same white race as his master, but of a black and naturally inferior race. But, on the other hand, this difference encouraged the passion and arrogance of the white master, who was not inclined or obliged to recognise a common human nature in the negro: and hence, cruelty and abuse was more frequent and violent than in antiquity.

Montesquieu.

There is force in the bitter and scathing irony with which Montesquieu (*Esprit des Lois*, xv. 5) touches the overbearing contempt of the white master for the negro slave: 'On ne peut se mettre dans l'esprit que Dieu, qui est un être très-sage, ait mis une âme, surtout une âme bonne, dans un corps tout noir: . . . Il est impossible que nous supposions que ces gens-là soient des hommes; parce que, si nous les supposions des hommes, on commencerait à croire que nous ne sommes pas nous-mêmes chrétiens.'

American slavery then was far harsher than European. Any care and attention which the slaves received from their masters was of the same kind as that which the peasant gives to his cattle. The denial of their dignity as men, the disregard of marriage and the family, the absence of religious

[7] Cf. the Article 'Leibeigenschaft' (Russische) by Tschitschérin in the *Deutsches Statswörterbuch*; T. Engelmann, *Die Leibeigenschaft in Russland*, 1884.

or moral education, unchecked traffic, often carried on with the most revolting cruelty, all combined to thrust them down, morally and legally, to the condition of domestic animals. It was a grievous offence against all order, divine and human.

Jefferson. It was a misfortune for America that Jefferson did not carry his proposal to add to the Declaration of Independence of July 4, 1776, in which freedom is declared to be an inalienable right of man, a protest against the admission and encouragement of negro slavery by the royal government. The original idea of a gradual removal of slavery was too feebly supported to overcome the effort of the slaveholders to protect and extend their property.

The free States could hardly maintain their balance in the federal government against the slave-holding States. In the course of a century the slave population had increased from several hundred thousand to several millions. The rapid development in the cultivation of cotton and sugar-cane had a disastrous influence in this direction.

Meanwhile the idea of the abolition of slavery passed from Europe to America. England here set the example, and on a large scale. Interested motives may have had a share in this, as in all human movements, but the cause was

Wilberforce. a just and sacred one; and William Wilberforce, the man who first devoted his life to it and maintained it with energy and success, in and out of Parliament, was inspired by the greatness of his cause. In spite of all mistakes in detail, the abolition of slavery in the English colonies, the compensation to the so-called owners, and the international treaties made for the suppression of the slave-trade, were acts of high service to mankind.

American Civil War. The victory of the Union over the slave-holding Confederate States of the South at once determined the abolition of negro slavery in North America. The Union no longer tolerates slavery within the limits of its authority (Constitutional Amendment of Dec. 18, 1865). Indirectly this decides

the question for the whole continent, for South America cannot long refuse to recognise the same principle. In fact, slavery has already been abolished in Brazil by a law of September 28, 1871.

Rights of the negro.

So far only the personal freedom and private rights of the coloured races have been recognised. The difficult problem of the political rights and position of the negro has yet to be solved. At present North America seems disposed to give the negro full political rights, but it is doubtful how long this will last. Political rights presuppose political capacity.

Is representative democracy, which hitherto has only succeeded among politically developed peoples, the natural form of government for masses of negroes? Are they capable of worthily maintaining and bravely defending a democratic constitution, which demands a rare self-control and manly energy? Those who best know human nature and political history will hardly dare to say yes.

The State and Slavery.

However, the following general principles may be recognised as following from the principle of the State, as founded on humanity (*das humane Statsprincip*):—

(1) It is the right and the duty of a State to sweep away any remains of personal slavery which exist in its territory. In so doing it is removing injustice.

(2) The State cannot tolerate any new introduction of slavery, even if a man wishes to make himself a slave.

(3) The State rightly refuses legal protection to a foreigner if he wishes to pursue his property in his slave within its territory[8].

[8] For England, cp. Blackstone, *Comment.*, i. 14. The English law of August 28, 1838 [3 and 4 Gul. iv. 73], regulates emancipation in English colonies, and declares every slave free who comes to Great Britain or Ireland with his master's consent. In France, we find as early as the sixteenth century the clause: 'Toutes personnes sont *franches* en ce Rolaume: et si tost qu'un Esclave a atteint les Marches d'icelui se faisant baptizer, est affranchi.' Loysel, *Inst. Coutum.* i. 6, 24.

French law of Sept. 28, 1791. Constitution of 1848: 'L'esclavage ne peut exister sur aucune terre française.' Article added to the Treaty of Paris, 1814: 'Sa Majesté très-chrétienne et sa Majesté Britannique

(4) Slaves who tread on a free soil are *ipso facto* free, and can claim the protection of the courts for this freedom.

s'engagent pour faire prononcer par toutes les puissances de la chrétienté l'abolition de la traite des noirs.'

[On the views held on slavery among the Greeks and Romans, see Oncken, *Staatslehre des Aristoteles*, ii. p. 29 ff.; Lecky, *History of European Morals*, ch. iv. vol. ii. p. 62 ff. (third edition).]

CHAPTER XVII.

PRINCIPLE OF MODERN CLASSES.

THE privileged classes (*Stände*) of the middle ages are everywhere broken up. The clergy have lost the position which their claim to divine dignity once gave them, and have generally ceased to be a separate political order. Their prelates are merged in the aristocracy, the rest form part of the upper citizen class. A glance at recent history will show how completely the mediæval Nobility (*Adel*), higher and lower, is disorganised, and how little adapted to hold an independent position as a privileged order. The Citizen class has lost its old character of a compact order: the educated classes occupy a very different place in modern representative States. Even the Peasant class, with its quiet and strong attachment to traditional ideas and customs, is drawn into the movement of the age and affected by its progress. Industry, too, has established itself in the country, and has disturbed the simple peasant life. Hitherto all attempts to reform the mediæval classes and rest the State upon them have utterly failed. The national instinct distrusts them, the nations feel that they have outgrown the mediæval organisation, and do not wish to see it restored, even in a revised form.

Privilege Classes pass away.

Still it is plain that the differences which undeniably exist between masses of the people have a real political significance, and that a mere fusion of all estates is unsatisfactory. If we wish to give these differences a place in

a constitution we must substitute Classes for Estates. Indeed, what we still call Estates[a] (*Stände*) are often not really estates, but Classes (*Classen*).

Classes and Estates.

The difference between them is this. Classes start with the State and end in it: while Estates have their basis outside the State. Classes presuppose the unity of the nation, Estates ignore it. Classes are a political institution based on national unity and public law (*eine nationale und statsrechtliche Institution*), Estates are groups formed on the basis of individual and private rights (*eine particuläre und privatrechtliche Gruppirung*), and their object is not exclusively or primarily political. The Clergy put the Church before the State: the Nobility think first of themselves and their own social interests, the Citizen lives for his business, the Peasant for his husbandry. Thus in the Estates we see the bond of common education and common way of life: the division between the groups is a professional one, while the State is only indirectly considered.

Estates are a natural growth: Classes are a phenomenon of civilised society, the national product of the organising power of political wisdom. Hence we only find Classes in civilised nations with a developed political sense: among the Greeks, especially at Athens, after the Solonian constitution; in Rome, after the Servian constitution, to which we owe the name 'Class'; and among the States of modern Europe.

There is no reason why existing estates (*Stände*) should not be considered in the formation of classes, but it is neither necessary nor desirable that classes and estates should coincide. If they do, the estates will determine the ordering of the State, as they did partially in the middle ages, and the inevitable result is that the estates become close, and the State is divided. The interests and prejudices of particular estates, backed by political power, will easily overbear the general interests of the nation and its

[a] [See above, Ch. viii.]

best thought. On the other hand, where there is a cross division, so that each class is composed of members of different estates, national life becomes more social, and politics gain a more varied stimulus and a higher tone.

Property Classes.

Classes have very often been formed on the basis of property. In these constitutions, by census (*Censusverfassung*), property becomes the determining political force, and citizens are valued by the amount of their income. This arrangement seldom corresponds to facts, and its principle belongs rather to economics and private law than to public law and politics. A mere mathematical principle of this kind is not to be compared with an organic division which looks first to the differences in political fitness and capacity, so far as it is possible to see and measure them. But to do this is no easy task. Speaking generally, four main Classes may be distinguished in the modern State:

Modern Classes.

(1) The Governing Class: princes and officials, with public authority, which gives them a superior position to all other Classes, at the head of the State.

(2) The Aristocratic Class, which does not govern as such, but occupies an independent and distinguished position between the Governing Class and the nation at large.

(3) The so-called 'Third Estate,' i. e. the class of educated and free citizens in town and country: the Middle Class proper.

(4) The People (*die grossen Volksclassen*), or the Fourth Estate, including the lower class of citizens in the towns, as well as the peasants: the great mass of the 'working classes.'

The Governing Class form the apex of the State, the People are its base: the energy and solid strength of a nation depend mainly on healthy relations between these two classes. The two intermediate classes complete, while they limit the action of the first class: modifying it with the influences of aristocracy and representative democracy. Their higher education and more favoured social conditions

give them the capacity, as their lofty feeling for law and freedom prompt them, to watch over the conditions of the general national welfare. They are the natural guardians, leaders, and representatives of the lowest and largest class.

CHAPTER XVIII.

SURVEY OF MODERN CLASSES.

1. The Governing Class.

THE Governing Class of to-day is historically connected through its princes with the earlier Nobility, though it has now risen above them to a sovereign position in the State.

The subordinate members of the class, officials and functionaries, and in republics the highest officials of all, spring chiefly from the two middle classes, and are socially connected with them: or if their parents belong to the great lower class, their superior education and profession put them socially on a level with the aristocracy or upper middle class, and they retain this position when they resign or lose their office. The authority of their office raises them above their neighbours. The lowest posts and offices reach down into the lowest class of all, that of the uneducated masses.

2. The Aristocracy.

The Aristocracy no longer form a close estate with special rights. Socially and legally they are connected with the other classes by the common rights of citizenship and essential equality, both in public and private law. Distinguished men from the lower classes from time to time raise themselves and their families to the social level of the aristocracy, and are gradually recognised as belonging to it. Still oftener, members of the aristocracy or their descendants lose the conditions which make their position possible, and are obliged to drop from the sunny heights of aristocratic

life to the lower levels of society. It is impossible to acquire the appearance or attributes of aristocracy without property, or liberal profession, or higher education. Hence the class is essentially a shifting one, exposed to constant changes by the ebb and flow of its members. This continual movement keeps it in the closest connection with the upper and educated citizen class; and facilitates intermarriage with the classes below it.

The transformation of the mediæval nobility into the modern aristocracy was first and slowly accomplished in England amid an aristocratic people. On the continent the débris of the feudal nobility occasionally obstruct the path of public life: but as yet the new aristocracy only occupies a doubtful and disputed position. The influence of aristocracy is visible in society, in the manners of courts, and in nominations to higher offices, but has as yet no recognised place in the legal and political consciousness of European peoples.

The German Empire ought to supply this want by a timely reform, which should follow on the lines suggested by the progress of history. Aristocracy can no longer be an exclusive or a sovereign order. Its place is that of a mediator softening the violence of authority, controlling the passions of the masses, and giving a higher tone to public life.

3. The Citizen Class.

The educated citizen class (*gebildetes Bürgerthum*) or the Third Estate.

The history of the French Revolution throws a clear light on the character of this class. The term 'third estate' (*tiers état*) in France was borrowed from the organisation of the feudal State, where it denoted the Citizens summoned to the States General, and there occupying a modest and humble position below the aristocratic estates of clergy and nobility.

The 'third estate' in France since 1789.

The Abbé Sieyès, whose famous pamphlet on the third estate brought light and fire to the revolution, asked and answered two questions: first, What is the third estate?—

Everything; second, What has the third estate been hitherto?—Nothing. Both answers are extravagant, but the first, by exaggerating the claims of the third estate, makes the very conception of it impossible. If it is really everything, there can be no first or second or fourth estate. It ceases then to be an estate or separate class, and is identical with the whole nation.

In the first French Revolution the third estate did actually demand that the two first estates, the clergy and nobility, should unite with them in a single National Assembly[1]. When this was accomplished, the third estate absorbed the rest, and as the one and equal nation (*das eine und gleiche ständelose Volk*) destroyed the entire organisation of the State. But in spite of their theories of equality, the natural differences among the people made themselves felt. The clergy and nobles were merged in the third estate, but as 'parsons' and 'aristocrats' they became persecuted orders and fell a bloody sacrifice to the Revolution. But the Government was still a chaos fermenting with new divisions: the fourth estate sprang into power and produced the leaders of the Convention, whose red rule made the power of the Gironde and the third estate grow pale. Thus the Revolution, which sought to prove the truth of Sieyès' words, only showed how false and inadequate they were[2]. The third estate had identified itself with the people, and posed as its representative. It had to learn that there were great masses outside it who were not content to be merged in one general body under its guidance.

The same opposition between the educated bourgeois class and the lower classes of the people came out most clearly

[1] The elections to the States General of 1789 had already given a practical extension to the conception of the third estate. In the middle ages it was limited to the citizens of the towns: in 1789 the peasants elected as well. De Tocqueville, *Œuvres*, viii. p. 139.

[2] Robespierre personifies the jealous hatred of all 'higher' classes united with an idolatry of the people. His declaration of rights contains the sentence: 'Toute institution qui ne suppose *le peuple bon* et *le magistrat corruptible* est vicieuse.' Cf. L. Stein, *Geschichte der socialen Bewegung in Frankreich*, i. p. 145.

in the French Revolution of 1848 and the Napoleonic Restoration of 1850, and again took a grim form in the Commune of 1871. Napoleon III, resting on the support of the fourth estate, had forcibly overthrown the third estate which had a large majority in the National Assembly. Then, after his defeat at Sedan, he was dethroned by a general rising of the masses; but the fourth estate soon snatched the power from the bourgeois class in Paris, and established the Commune.

in Germany.

The same opposition was seen in Germany at the time of the Peasants' War. But happily for Germany the antagonism has, in recent times, been less sharp and hostile there than in Paris: though it is not without influence both in the town and country population; in the latter, more in questions of religion and the relation of the uneducated masses to the authorities of the Church, in the former in economical and social questions.

The Citizen Class not an Estate,

This citizen class, though historically connected with the third estate of the middle ages, cannot properly bear this name; it is no longer a rigid exclusive estate with special rights. Like the aristocracy it is a fluid body, whose members continually come and go. But the more educated citizens, the 'educated classes' (*die Gebildeten*), are still essentially distinct, both from the aristocracy and from the people, and the distinction affects the constitution, and still more the policy and administration of the State. They differ from the aristocracy in this, that they make no special claim to a position of authority, and therefore demand no peculiar privileges, either of title or rank, or of representation in an Upper House or a first chamber. Their education is of a civil character, their social and political status rests on the basis of common nationality and common rights, so that they naturally share in popular representation. They are raised above the more numerous classes of the people by superiority in scientific or artistic training, by social refinement and the practice of liberal professions; they work with the brain rather than the hands, and devote

themselves less to the material needs of life than to its higher intellectual efforts.

They form a popular class (*Volksstand*), but rise above the mass of the people: like the aristocracy, they are an intermediate estate (*Mittelstand*), but they are nearer to the class below them, and they receive constant accessions from it. In England 'gentlemen' come under this head, but are a narrower and more select class than that of the upper citizen class (*das höhere Bürgerthum*) in Germany, France and Italy. Under this head come the following classes of the population :— but a popular middle class.

1. Government officials (*Statsbeamte*), excepting the highest, who belong to the first, or governing class, and the lower grades, of mere clerks and servants. Its composition.

2. The Clergy, and the Teaching Class generally.

3. Lawyers, physicians and chemists, students, and men of letters.

4. Artists, engineers, and members of the higher technical professions.

5. Merchants and manufacturers.

6. The highest class of handicraftsmen.

7. Capitalists (*Rentiers*).

8. Great landowners, not belonging to the aristocracy.

Higher education, though not necessarily that of an University or Polytechnic, is an essential attribute of this class, and it generally implies an amount of means sufficient to allow leisure for public affairs. Election to government offices, as a rule, presupposes an University education : and the superior fitness of this class to take part in the work of representative bodies generally gives them, in the absence of special laws against it, a preponderance in national assemblies and legislative chambers.

This class, as a rule, is the most influential in the life of the State : it takes the lead in public affairs, and determines public opinion. Though its membership is determined by education, property, and profession, without regard to birth, it may fitly be compared with the old class of Freemen Its political power.

(*Vollfreie*) or the mediæval class of the *Mittelfreie*. Like them it forms the main body of those who possess political rights, and holds a prominent place in public offices.

4. The lowest class.

The great popular classes (*die grossen Volksclassen*), the 'fourth estate,' and the proletariate. In this class we include the great mass of the people who do not belong to the three upper classes, 'the people,' as we sometimes call them. It includes men of the most varied occupations and conditions of life, but all connected by the tie of common country and nationality, and above all, common rights as citizens (*Statsbürgerrecht*). It comprises the following groups, occupying various places in the economy of the State :—

'The People.'

Its composition.

(*a*) The mass of peasants who work by themselves or with their servants, ploughing, mowing, gathering crops, tending vines or cattle. They form the largest and most vigorous element in this class, and are a great source of national strength, from which the other classes draw new life and vigour.

(*b*) Herdsmen, fishermen, seamen, and miners, and generally all labourers whose work brings them into immediate contact with nature.

(*c*) The lower citizen class (*der niedere Bürgerstand*), both in town and country, including first the small master-artisans with their men, and small tradesmen, but also the lower industrial classes, whether they work in their own homes, at hand-looms for instance, or in factories.

(*d*) The lower employés of the State, or of professional men ; privates in the army, clerks, &c.

(*e*) The 'proletariate,' consisting of the lowest class of servants and day-labourers.

All these groups have this much in common, that they are engaged in bodily labour and in the supply of material wants. It is of course impossible to draw a hard and fast line between brain-work and hand-work, for, as a rule, each is impotent without the other. But the distinction is a sound and intelligible one. Brain-work requires a higher

intellectual training, and a higher standard of life. Mechanical work is possible with a minimum of education, and a simple and rudimentary way of life. Hence they naturally fall into different classes.

A further characteristic of the fourth class is that, while they form the necessary substratum of all States, and of national life generally, they have no capacity for government. Hence they need leaders and representatives. As a rule they express the passive and subordinate element in the social body, but when their passions are roused to revolt, nothing can resist the force with which they overturn the existing order and make their will law. They are strong enough to change a government or to extort a constitution: they can overturn a throne and entrust the power to new men or new dynasties, but they have no capacity for government; for them to govern is for the pyramid to stand on its apex.

Its present importance.

This class has never yet had such an importance in political life as in the European States of the present day. For the first time the serving classes (*die dienenden Classen*), in the narrow sense of the word, have become free men: even the lowest class feel that they have a share in the well-being of the State, and a claim to political rights. The statesman of to-day is forced, by circumstances, to pay special attention to the condition of this fourth estate. It is not enough now to hear and consider the public opinion of the educated classes: the masses, with their instincts and passions, have gained in influence. The modern State—speaking primarily of the European, that is, of the Aryan nations—has, in this sense, become more widely human.

But the fourth class is so wide that it includes large groups of different occupation and grades of life. It unites in it the strongest and weakest elements in the political body. It is essential to the safety and the maintenance of the State, but it is constantly threatening its very existence. Its soundest part is to be found in the peasant-class, but

even they need to be quickened by some religious or intellectual movement if public order is to be saved from destruction. Next to them come the lower citizen class (*Kleinbürger*). Both still retain the communal organisation. But this is not enough for the needs of the crowded masses of citizens in the towns, and other social bonds have been broken. The old organisation, which united master craftsmen with one another and their journeymen, has perished. The old system has decayed, and has left whole classes, especially the workmen in factories, unorganised. The voluntary associations and trades-unions of workmen are the first germ of a new organisation. Society suffers from this disorganisation: community of interests, of education and of spirit among the different classes of labour, if not annihilated, is certainly disturbed, and the general ferment tends to an aimless war of every man against his neighbour. Measures of police are useless: they may check or suppress the evil in particular cases, but they often aggravate it by applying an irritating treatment where remedial measures are needed. It is not surprising that atheism and communism have found a fruitful soil in the lower strata of the fourth estate, and that in most large towns, and even in some parts of the country, the rank weeds threaten to choke the nobler growths of the past.

Its want of organisation.

The Proletariate form the lowest grade of the fourth class. It must not be identified with it, or organised as a class or order. The business of the statesman is rather to merge it, as far as possible, in the other classes, and so prevent its growth as a separate body. It consists mainly of the waste (*Abfälle*) of other classes, of those fractions of the population who, by their isolation and their poverty, have no place in the established order of society.

The Proletariate.

It is false and politically dangerous to divide the inhabitants of a State by a fixed line into 'those who have' and 'those who have not,' and to sum up the latter as the proletariate, and set them in opposition to the former. If this inorganic view, which has been too much encouraged, were

to spread and become dominant, it would involve the destruction of civilised society by a new wave of barbarism. Happily, the majority of those who have not are still in organic connection with the other classes, and find satisfaction in this. Children without property are not part of the proletariate, because they find support and education in the family, and share the position of their parents. Even orphans find family life in the organisation of the parish.

Again, the mass of farm servants, male and female, who have no property cannot be included in the proletariate, because they do not stand alone in the world, but find a home in the farm or family of the peasant, and share in the life of his class. When handicrafts were better organised, the journeyman was a member of his master's family, and even now that this tie is dissolved, the sense of belonging to the artisan class lifts him above the proletariate. Even domestic servants (*Dienstboten*) live in a position of some comfort, and have some share in the life of their masters. The occupation of a soldier supplies him with pay and honour.

The most dangerous feature is the disorganised condition of the common labourer: it is in this class that the mass of the proletariate has grown to such large and threatening proportions. The true art of the statesman will lie, on the one hand, in trying to prevent members of the organised classes of labour from falling into the unorganised proletariate; and on the other, in assisting as many as possible to rise from the proletariate into the organised class, where they can obtain a comparatively secure subsistence. The proletariate thus narrowed would need not an independent organisation, for which it is unfit, but a body of guardians (*Patronat*), which should defend its interests and act and speak on its behalf.

Political claims of the Fourth Class.

The fourth class has not the capacity to fill the offices of the State, but its better members are capable of holding municipal offices, and cannot be excluded from them. It

ought to have a share in the representation of the nation, and the State will do well to see that the third class, with their superior education and greater leisure, do not, as they do, completely deprive them of this. But as the members of this class often have neither leisure nor ability to represent their interests in person, they must be able to elect representatives from beyond their own class. Finally, the importance of this class entitles it to a vote: but where the social importance and capacity of the individuals composing it is so various, it is unjust to give equal power to all.

The real interests of the proletariate proper demand Patrons (*Patrone, Schutzherren, Mundherren*) rather than representatives, which it cannot find in its own ranks. The higher the position and influence of the 'patron,' the more effective would be the defence of the rights of the proletariate.

CHAPTER XIX.

THE RELATION OF THE STATE TO THE FAMILY.

I. The Tribal State—Patriarchal Government—Marriage.

Ancients and moderns alike have found in the family the pattern of the State[1]. The State, they say, is an extension of the family, the head of the State being the father, the people his children.

This comparison is only true in a limited sense; it only applies to the patriarchal State, not to the higher forms of the State, which are based on nationality or humanity. It is necessary then to point out the radical differences which distinguish the State from the family.

Differences between the State and the Family.

1. The family is based upon marriage. Its members are united by the marriage tie or by blood. But these conceptions which are essential to the family are by no means essential to the State. The members of a State, as such, are not connected by marriage or blood. They have not always the right of intermarriage, still less do they share a common descent. The fundamental rights of the family are then independent of the State[2].

[1] Cicero, *de Officiis*, i. 17: 'Prima societas in ipso conjugio est, proxima in liberis, deinde una domus, communia omnia. Id autem est principium urbis, et quasi seminarium reipublicae.' Even Rousseau, in his *Contrat Social*, though inconsistently with his main view, says: 'La famille est la première image de la société politique.' [Arist., *Eth. Nic*, viii. 10. § 4; *Pol.* i. 2.]

[2] Pomponius, in Dig. l., Tit. 17, *de Reg Jur.*: 'Jura sanguinis nullo jure civili dirimi possunt.'

2. The State is based on the organisation of the nation and its relation to the soil. But these ideas find no place in the family. The State consists rather of individuals, or orders, or classes, than of families, and only exceptionally approaches its members through the family, only interfering in family life when there is a special demand for it, and in the case of guardianship. Lastly, the family has no connection with the soil.

3. The two organisations differ in character. The head of the family is the father, whose authority is the care of a grown man for the defence of his own flesh and blood; it is essentially a guardianship (*Vormundschaft*). In the nation the different classes have interests apart from those of the prince their head; their families are not connected with his, nor are their individual members his children or his wards. The government of the State is political.

Hence the family is not a pattern of the State, but only of one particular form of it, the patriarchal[3]. Family law therefore belongs to private, not to public law.

But even in the Aryan nations the beginnings of the State are connected with the bond of the family and the tribe. It was here that the first leaders, judges and magistrates found the necessary support for their authority: and it was only gradually that a political order arose which outgrew these limits.

Tribal constitution.

The tribal-constitution (*Geschlechterverfassung*) served as a bridge between the family and the State, and fell away as soon as the State was assured. Among most ancient peoples, in the Mosaic constitution as well as in those of Greece and Rome, we find tribes with a political meaning, which afterwards disappear. The filial respect of the Arabian tribes for their chiefs finds its parallel in the Scotch clans. The old German names of villages point to the

[3] Gobineau, *Sur l'inégalité des races humaines*, ii. p. 270, notices that the patriarchal view, which regards the authority of the father as typical of the sovereign power, has been admitted by the Aryans only in a cautious and modified way, whereas it has continued to satisfy the Chinese, in whom the yellow race predominate.

settlement of tribal communities[4], and the old Slavonic community is also based on the family.

The tribe differs from the family in being extended to include several groups of blood-relations (*Sippschaften*), but its organisation follows that of the family. The chiefs of the tribe are generally marked out by their high position in the family, but the need for unity limits the headship of the tribe to a single head of a family, and it may happen that choice or election takes the place of hereditary right.

The Patriarchal State.

The only State strictly modelled on the family is the patriarchal State (*die Patriarchie*). The Chinese Empire of 'the mean,' or of perfection, has held fast for centuries to the fiction that the head of the State is father of his people. Gobineau, who has shown grounds for believing that the State was first founded by Aryans, ascribes the patriarchal idea to their suggestion. But the vast mass of the population of this great empire, which has been gradually united in one family, is of a Malay stock, a yellow race, modified by darker elements. This population, which is naturally inclined to an easy material existence, willingly acquiesces in the paternal absolutism of its rulers, and honours the traditional order of the State as a divine civilisation. It is not stirred by the sturdy sense of freedom which is inborn in the Aryan nations, and it has no aspirations. The authority of the Emperor is in theory absolute, but is in fact limited in many ways by the quiet spirit of all classes of the people, by the scholastic learning of the mandarins, and, above all, by the force of hereditary family usage. '*Le Fils du ciel peut tout, mais à condition de ne vouloir que ce qui est connu et traditionnel*' (Gobineau). But a vigorous political development is impossible where the State and its members are kept in a perpetual childhood.

The influence of Family on the State.

The influence of family life on the well-being of the State is a very different question. Its influence, though mainly indirect, is wide-reaching, and can hardly be estimated too

[4] Gierke, *Genossenschaftsrecht*, 1868. i. p. 29.

highly. Hence the State is not only bound to defend family law as a part of private law, but has a special interest in advancing and maintaining the welfare of family life. As the family is not a political institution, the power of the State is small, and mainly indirect: but there are some relations in which it can and ought to limit individual caprice.

Marriage, the highest form of which is Monogamy.

All the more advanced nations attach cardinal importance to Monogamy. Polyandry confuses descent: polygamy produces discord. The full unity of marriage, the complete reconcilement of the sexes, can only be realised in monogamy. Nature and the moral ideal alike demand it. When the Gallic bishops were zealous against the bigamy of the Merovingians, and did not yield till the latter resigned this ancient privilege of Teutonic kings, they were defending not merely a Christian, but also a political principle. Monogamy raises the wife to a full society with her husband, and so gives her an ennobling influence on him. Polygamy degrades the wife, and her degradation reacts on the husband and debases him. Monogamy is one of the advantages of European and Christian peoples: polygamy is the hereditary curse of the East.

The law of husband and wife.

The legal relations of husband and wife are a matter of great importance.

Here Roman law fell short of the Roman ideal of marriage. While the Romans regarded marriage as a complete and intimate union for life[5], their older law treated the wife as a daughter, no less absolutely in the power of her husband [*conventio in manum*] than the son in that of his father, and the slave in that of his master: while the later law resolved the union into a mere connection of two independent persons. This 'free' form of marriage [*sine conventione in manum*] became more frequent as Roman morals

[5] Modestinus, in Dig. xxiii., Tit. 2, *de Ritu nuptiarum*: 'Nuptiae sunt conjunctio maris et feminae, et consortium omnis vitae, divini et humani juris communicatio.'

Justinian, *Inst.* i. 9, § 1: 'Nuptiae sive matrimonium est viri et mulieris conjunctio, individuam consuetudinem vitae continens.'

grew more corrupt, and helped forward the decay of the Republic.

German law, on the other hand, both in its older form, where man and wife retain their own property, while the unity and community of marriage finds legal expression in the guardianship of the husband, and in the later form of community of property, is in harmony with the idea so nobly expressed in the Jewish Scriptures: 'And they shall be one flesh[6]:' and 'The husband is the head of the wife[7].'

Marriage ceremony.

Even the outward forms of marriage are not indifferent. A form which emphasises the intimacy and sanctity of the relation is to be preferred to one which treats it as the arbitrary result of a mere agreement. The old Roman principle that '*consensus facit nuptias*' is dangerous because it leads to the idea that marriage is a merely conventional relation: and hence it is only natural that the customs of many peoples demand a religious ceremony, and the usage of the Christian Church lays stress on this. But, further, the legal security of the family, which is of the utmost importance, is incompatible with a secret marriage, and is only satisfied by a public form with documentary evidence. The 'civil form' satisfies these conditions. Had not the ecclesiastical form been abused by the clergy to interfere with the

[6] *Gen.* i. 2–24, quoted by Paul, *Ep. to Ephes.* v. 31: 'Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh.' Tacitus, *Germ.* 19 (of German wives): 'Sic unum accipiunt maritum, quo modo unum corpus, unamque vitam, ne ulla cogitatio ultra, ne longior cupiditas, ne tanquam maritum, sed tanquam matrimonium ament.' Schwabenspiegel (*Wack.* 6): 'Wan die (ein man unde sin wip) reht unde redelichen zer ê chomen sint, da ist nicht zweiunge an, si sint wan ein lip.'

[7] *Gen.* i. 3–16: 'Unto the woman he said . . . thy desire shall be to thy husband, and he shall rule over thee.' Paul, *Ep. to Eph.* v. 22: 'Wives, submit yourselves unto your husbands.' *Sachsenspiegel*, i. 45. § 1: 'Al ne si en man sine wive nicht evenburdich, he is doch ire vormünde, unde se is sin genotinne, unde trit in sin recht, swenne se in sin bedde gat.' *Code Civil*, Art. 213: 'Le mari doit protection à sa femme, la femme obéissance à son mari.' *Austrian Code*, § 91: 'Der Mann ist das Haupt der Familie.' *Code of Zürich*, § 127: 'Der Ehemann ist das Haupt der Ehe.'

freedom of marriage recognised by the State, and to make legislation dependent on the views of the Church, modern States might have rested satisfied with it. But these abuses, and the existing diversity of religious opinion, have made a purely civil form necessary. A twofold form is now in use.

(1) The civil marriage before the officers of the State, which is necessary to make a marriage valid.

(2) The subsequent ecclesiastical ceremony, conducted by a clergyman, which gives a religious sanction to the marriage. This is voluntary.

Encouragement of marriage.

The emperor Augustus made an attempt to encourage marriage and population by law. Such measures could only be necessary in an unhealthy and abnormal condition of the people. The life of large towns is apt to be unfavourable to marriage, and in Rome the liberty of bequest acted as an additional check, since a rich man who was unmarried could be sure of being cared for in his old age by the servile complaisance of greedy relatives and friends. Augustus might well say: 'It is not houses, or colonnades, or market-places which make a city, but its men. . . . If you persist, Rome will become the prey of Greeks or barbarians[a].'

But in the country, too, we find legal restrictions with a view to maintaining peasants' holdings, and to prevent the partition of estates. Thus in many places only two children inherit (*Zweikindersystem*), in others all but the eldest son (*der Erbsohn*) are regarded as farm-servants, or sent abroad. The means which the State can use to encourage marriage and population are limited, and in any case, as Augustus found, are unpalatable. Marriage cannot be directly enforced, because the freedom and will of the parties is essential to it. Even in the case of the head of the State, where public interest may make a marriage very desirable, the will of the State has to give way rather than encroach upon individual rights or violate human freedom. Queen Victoria successfully maintained the freedom of the monarch

[a] [Dio Cass. lxi. 2–9.]

in this respect against urgent political considerations. The State can only act indirectly, by attaching privileges to marriage, and disadvantages to celibacy, without treating the latter as a crime; and this was the method adopted by Roman legislation.

In modern States, on the other hand, it is more common to find restraints put upon marriage in the interest of public welfare [b]. Such laws are prompted by an unsound condition of society, especially by the evil of classes without property or occupation. The community may then demand, in its own interest, that those who wish to marry and found new families should prove that they can support a family without burdening the public. But to go beyond this, and make marriage conditional on the arbitrary consent of the State, is an unjustifiable infringement of individual rights. Further, legal restrictions on marriage rather promote than hinder the birth of illegitimate children, and so increase the number of the ill-fed and ill-cared-for population. The foundation of a family and the help of the wife exert a moralising influence on the husband, and may even be economically advantageous: and therefore, as a rule, freedom of marriage is to be recommended. If the laws have in view the good of all, they must make it possible for the poor man to choose a mate in his poverty and a legitimate mother for his children.

Restraints on marriage.

The State cannot properly interfere with the private relations of man and wife [a]. But it can and ought to punish breaches of conjugal fidelity, on the complaint of the injured party: and so defend the purity of marriage.

Community of wives, as proposed by Plato for the guardians of his ideal State, degrades marriage and destroys the family. The prostitution of the wife, practised in some cases at Sparta, is a relic of barbarism. But the 'emancipation of the flesh,' advocated by the radical-socialist school,

[b] [For laws and customs restraining marriage, see Mill, *Political Economy*, Book ii. chap. xi.]

[a] The *Laws of Manu* (iii. 46) lay down rules on the subject.

as a progress in the freedom of the individual, is a degradation of the moral freedom of man to the sensual freedom of dogs.

Marriage and divorce.

Lastly, the State's provision for permanence of marriage and limitation of divorce must be mentioned.

Even in pre-Christian times dissolution of the tie was not always left to the will of the individual man and wife. Many legal systems allowed the husband to dismiss his wife, though he was generally required to show sufficient reason, and, as we see in the old Teutonic laws, incurred serious disabilities if he could not. The wife, on the other hand, could not dissolve the marriage. These regulations, confirmed by custom, express the public regard for marriage as a union for life. It was a distinct breach in this conception when Rome, adopting the Athenian view, made free marriage dissoluble at the notice of either party (*nuntium mittere uxori*, s. *marito*). This was in great measure a result of the decay of morals at Rome, and again reacted on it.

Christianity introduced a new and more complete law on this question. The words of Christ himself against divorce were so emphatic that[9], though they did not definitely create a new law or alter the old, they indirectly moulded the legal conceptions of Christian States. The Catholic Church developed a rigorous system of marriage law, and in spite of Christ's express recognition of adultery as a ground for divorce, in time came to forbid complete divorce altogether, and only to allow outward divorce (*separatio a toro et mensa*), and that on few and grave grounds. The mediæval Christian States so far adopted this view that they allowed questions of divorce to be treated entirely before ecclesiastical tribunals. In more recent times the State has rightly resumed the treatment of these questions, and the Protestant Church has admitted divorce on ground of adultery or equivalent reasons. Finally, in deference partly to modern ideas of natural

[9] Matt. v. 32, xix. 8; Mark x. 11, 12; Luke xvi. 18.

rights, partly in the interest of individual freedom, modern legislation has extended the grounds of divorce, and made it easier.

But two principles have been generally retained :—

(1) That marriage may not be dissolved merely by the will of one party, or the agreement of both, but only with the intervention and sanction of a court of law.

(2) That this sanction must not be given without sufficient reason.

The Church, speaking to the moral and spiritual nature of man, is the proper advocate of the principle of indissolubility which the ideal of marriage demands. The State, as concerned with external compulsion, is bound to consider the imperfections of actual conditions, and to permit the outward dissolution of marriages which have no inward unity or cohesion. But, so far as national customs and individual development allow, it ought still to retain the principle of indissoluble marriage as an ideal, and to subject divorce to a rigorous control.

CHAPTER XX.

THE RELATION OF THE STATE TO THE FAMILY.

II. The Position of Women.

Political rights of women.

HITHERTO all nations have regarded women as belonging to the same people and nation as their husband or father, but as only indirectly connected with the State, not as full members of the State with full rights (*vollberechtigte Statsglieder und Statsgenossen*). But the modern period has given birth to a different view. As early as the French Revolution of 1789, a women's petition to the king demanded that political rights should be granted to women. The petition, though supported by Condorcet, was rejected with scorn by the National Assembly. In our own time the same demand has been advocated in different countries, and especially by John Stuart Mill both in his writings[1] and in Parliament. In France, Édouard Laboulaye[2] has spoken on the same side. In some States of America attempts have been made to give women a share in political rights and duties[a].

Mill.

The main reasons alleged by Mill for the direct participation of women in the State are:—

(*a*) Women have the same right as men to be well governed, and good government is the object of representation.

But children have a natural right to be well governed, that is, to be protected by the State; but no one argues that

[1] *Representative Government*, ch. 8 [and *The Subjection of Women*].
[2] *Histoire de l'Amérique*, vol. iii.
[a] [In England female ratepayers have a vote for Town Councils and School-Boards.]

they must therefore have a vote. The right to be well governed does not involve the right to take part in or to control the government: the former is a purely passive right, the latter presupposes personal capacity.

(*b*) There is a glaring contradiction between private and public rights which ought to be removed. In private law women were at first limited in their acts, and regarded as wards of their husbands, but when it was recognised that women could manage their own property, this tutelage was abolished, and the sexes put on an equality. On the other hand, in public law, the difference is maintained. We require women to pay taxes with men, and refuse them the right of giving their assent to them or of controlling their expenditure. It is unjust to deny here the capacity which we have admitted elsewhere, and to prevent the extension of an equality, which has proved beneficial in private life, to the field of public affairs.

The anomaly of queens.

(*c*) There is a further inconsistency in our present laws. Many nations which deny all political rights to women, occasionally bestow the supreme power of government upon a queen.

This does not apply to Greece and Rome. Heliogabalus introduced his mother into the senate, but so shocked Roman ideas, that after their death a decree of the senate was passed devoting to the gods below any one who should introduce a woman into the senate[b]. Most Teutonic nations confined the monarchy to males. Tacitus (*Agricola* 16) mentions, as a peculiarity of the Britons, that they admit female rule [*neque enim sexum in imperiis discernunt*][c]. The Lombards too often allowed succession to the monarchy through the female line. In more modern States women have frequently sat on the throne, and the last few centuries

[b] [Lampridius in *Hist. August.* chap. 4. 18. But women were not *legally* excluded from the Principate. Cf. Mommsen, *Röm. Staatsrecht*, ii. p. 764.]

[c] [Bluntschli quotes Aristot. *Pol.* iii. 6. 16 (*Schneider*), for the statement that many foreign nations are ruled by women. The reference is wrong: he appears to be misunderstanding ii. 9. § 7.]

have seen female rulers in England, Austria, Russia, Spain, Portugal, and elsewhere, under various forms of government.

Why this strange exception? It might seem more natural for a woman to hold a subordinate office in the State than to be its queen. It can only be explained on the ground that the position of the head of the State has been treated as family property, and a woman has been allowed the same right of succession to the throne as to the estates of her father. The land of the estate was treated as a domain (*Allod* or *Lehensgut*), subject to the same principles of inheritance. This right had its origin in antiquity, and was afterwards extended: and many modern States which have outgrown the idea of the feudal state, and in other matters draw a sharp distinction between private and public law, still retain this relic of the old system, which attaches more weight to the family tie of blood than to the nature of the State and the vocation of woman [3].

(*d*) As most women live in a family, they would as a fact generally go with the head of the family: the wife would vote with her husband, the daughters with their father. Thus the political importance of the heads of households, who form the backbone of the State, would be strengthened as against the less organised constituents of the State.

(*e*) The influence of women on politics is inevitable, but at present it is mainly indirect and irresponsible. If it once found a recognised channel, it would act with greater moderation and sense of responsibility.

Perhaps the last argument is the strongest: but still stronger arguments may be urged on the other side.

Arguments against women's franchise.

(*a*) The consensus of usage in all civilised nations is a presumptive argument against a change, which runs counter to the permanent conditions and feelings of mankind.

[3] Cf. Laboulaye, *Recherche sur la condition civile et politique des femmes*, Paris, 1843. It is worth noticing that, as a rule, female rulers have prospered, partly because they have been more ready than male rulers to accept the guidance of great statesmen.

(*b*) The nature of woman. Her proper sphere is the life of the family, for which she would be unfitted by mixing largely in public duties and political struggles. Womanly virtues would suffer,—woman's love as mother and wife, her housewifely skill, her fine sensibility and sweetness of character,—and there would be no gain in political capacity to make good the loss.

(*c*) The manly character of the State. The State, as the nation, consciously determining and governing itself, cannot afford to weaken its manly character by the admixture of feminine weakness and susceptibility.

(*d*) The great danger, that political struggles would become more passionate and less amenable to the guidance of reason. The State would suffer if its passive elements were thus increased, and the active diminished.

Hence, while we may tolerate such exceptions as female succession to the throne, which in favourable circumstances and in a civilised country may do no harm, it would be disastrous to bestow political rights on women generally.

Indirect influence of women.

But if women are thus excluded from a direct share in public affairs, their indirect influence on the public welfare is not to be despised. Even here it easily degenerates if it is guided by political aims: it only remains pure and wholesome when it is determined by moral or religious motives. Women who have been famous in politics have generally done harm to the State and their friends. Their cleverness and acuteness become dangerous intrigue: and when once the passions of political hatred, revenge, and greed have been kindled in a woman's breast, they spread like wildfire. This is true not only of the mistresses of princes, but of many wives and mothers notorious in history. The history of Rome, the French Revolution, the courts of the French kings, all tell the same tale.

On the other hand, statesmen have often owed much to that quieter influence of women which no history records: they have found in their homes the peace which compensated them for the turmoil of public life, and strengthened them

afresh for their duty. Woman's gentleness has softened their savage humours, her prudence and her sense of conduct have kept them clear of extravagance and crime, and her courage has saved them in time of need. For woman's power is never so great or helpful as in time of suffering and danger. More patient than man, she can help him to bear suffering without being humiliated by it: her devotion rouses him to sacrifice himself for his country, and her admiration of his courage incites him to deserve it.

It is a fine feature in the public law of the Teutonic nations, that the wife is regarded as sharing the political dignity of her husband. Thus woman receives her true place in the organisation of the State, and is amply compensated for her exclusion from political rights.

Note.—Riehl in his social-political study on '*die Frauen*' (*Deutsche Vierteljahrsschrift*, 1852), and in his book *die Familie*, among other subtle observations, has rightly called attention to the difference in the relation of the sexes in different classes. The manners and life of a peasant woman are much more like those of the peasant, than those of the woman of the upper middle class are like those of her husband; but on the other hand, the former is subject to a severer domestic discipline. But I object to Riehl's attributing a distinctive party character to woman and calling her a conservative. Women are only indirectly interested in political parties, but they are interested in all. If we adopt Fr. Rohmer's division of parties into 'masculine' and 'feminine,' it is plain that liberal and conservative will come under the former, radical and absolutist under the latter.

CHAPTER XXI.

RELATION OF THE STATE TO INDIVIDUALS.

I. Natives and Aliens.

Individuals are not only connected with the State as members of families, estates and classes, but stand in immediate relation to it. Modern political theory and modern constitutions have tended to emphasise this direct relation. Hence we have to consider—

(1) The difference between Natives, or Members of the State or Nation, and Foreigners.

(2) The difference between Citizens and other members of the nation. We need not consider the different grades within the citizen body till we discuss the constitution in detail.

The first difference depends mainly on race, and is primarily a personal one: considerations of domicile are secondary. A man's first connection is with the nation, his relation to the land is less essential.

The ancient view that a stranger has no rights, and must be treated as a creature without rights, unless he is put under special protection, though held by the Greeks and Romans[1], was a barbarous blot on ancient civilisation. The Teutonic principle was more humane, 'Every man

[1] This view, as we find it at Rome, does not mean that the foreigner is on the same level as the slave, but that his rights are unprotected in the Roman State. Cf. Ihering, *Geist des römischen Rechts*, i. p. 219 ff. *Hostis* originally means 'guest,' 'stranger,' and 'enemy.'

after the law of his own nation' (*Jeder nach seinem angeborenen Volksrecht*. Modern law recognises that the foreigner has rights, and protects him accordingly.

What makes a Native?

1. But there are various answers to the question, who is to be regarded as a native, and how a man becomes a member of a nation. Descent and domicile are the determining factors, but they may be combined in different ways.

Nationality may be determined by—

a Birthplace.

a. Place of birth (*Geburtsort*). This is in the main the later mediæval view, and is still the principle of English law, which distinguishes 'natural-born' subjects from 'aliens.' Birth on an English ship or in an English embassy is equivalent to birth in England. But the principle has been so far modified that the children of Englishmen, born abroad, become English citizens: and naturalisation has become much easier[2]. The law of the United States goes on the same principles[3].

b. Domicile.

b. Domicile.

This form of the territorial principle is more in keeping with modern ideas, because it lays stress not on the casual place of birth, but on the permanent domicile of the parents, and subsequently of the man himself. But here differences arise, according as settlement is made easy or difficult. This was the principle partially followed by Austria in earlier times and by individual German states[4]. But there, too, it was modified by the forms of a personal grant of native rights.

[2] Blackstone, *Comm.* i. 10; Stat. 7 and 8 Vic. cap. 66. By the law of 1870, St. 33 Vic. cap. 14, naturalisation has been made still easier.

[3] Birth in the territory of the United States constitutes citizenship. But the children of citizens born abroad acquire it by descent. Settlement in the United States is the essential condition of naturalisation, which is very frequent. Cf. Story, *Commentaries on the Constitution of U. S. A.*, book iii., ch. 16, and Rüttimann, *Nordam. Bundesstatsrecht*, i. 89.

[4] *Austrian Fundamental Law*, § 29: 'Foreigners acquire Austrian citizenship by entering the public service, by adopting a business which involves regular settlement in the country, by a continuous residence

(*c*) Midway between these comes the Swiss principle of membership in the commune, which forms the basis of membership of the Canton (*Cantonsbürgerrecht*, and of the Swiss confederation (*Schweizerbürgerrecht*). The rights in the commune depend not on place of birth or domicile, but on descent from parents who are citizens of the commune, even though they live outside it[5]. It is not unlike the old Roman municipal law, which was also based on *origo* from a particular *municipium*[a]. *c.* Membership in a commune.

(*d*) Modern States, generally, recognise nationality as a personal relation, not mainly dependent on place of birth or domicile, but on descent from members of the nation and personal reception into its membership. Place of birth and domicile come in to complete the notion. *d.* Personal relation to the State.

This, in the main, is the principle for France[6], Prussia[7], and the German Empire[8]. This system best corresponds

for ten years in the country.' But by the *Fundamental law* of 21 Dec. 1867, Art. 3, foreigners cannot enter the public service till they have become members of the State. The other conditions were abolished by a *Court-decree* of 1 May, 1833, and an Imperial Ordinance of 27 April, 1860. See Ulbrich, *Lehrbuch des Oesterr. Statsrechts*, p. 81.

[5] Bluntschli, *Schweiz. Bundesrecht*, i. p. 529, and in detail Bluntschli, *Stats. und Rechtsgesch. von Zürich*, ii. p. 14 ff.; Cherbuliez, *De la Démocratie en Suisse*, i. p. 177 f.; Blumer, *Bundesstatsrecht*, i. 249 f.

[a] [Cf. Marquardt, *Römische Statsverwaltung*, i. p. 135.]

[6] *Code Civil*, Art. 10: 'Tout enfant né d'un Français en pays étranger est Français.' Consular constitution of 1799, Art. 3: 'Un étranger devient citoyen français lorsqu'après avoir atteint l'âge de 21 ans accomplis et avoir déclaré l'intention de se fixer en France, il y a résidé pendant dix années consécutives.' [The term was reduced to three years by the law of July, 1867; cf. also l. 22–29 Jan. and 7–12 Feb. 1851. *French trans.*]

[7] *Law of* 31 Dec., 1842. Prussian nationality depends mainly on descent: the legitimate children of Prussians are Prussian citizens, even though born abroad. In naturalisation the chief condition is domicile; v. Rönne, *Statsr.* i. § 87.

[8] Citizenship in the German Empire (*Reichsangehörigkeit*) presupposes citizenship in one of the provinces of the Empire (*Landesangehörigkeit*), and this generally depends on descent or naturalisation.

German Law of 1 June, 1870, § 1: 'In the case of birth in a foreign country, the legitimate child of a (North) German father and the illegitimate child of a (North) German mother both count as German.'

to modern political ideas, which regard the personal relation to the nation as the essential germ of the conception of the State.

But the different systems tend to approach and supplement one another. Descent, birthplace, domicile and naturalisation, marriage and legitimation, thus all combine, directly or indirectly, to constitute the qualification for citizenship.

To sum up: Membership of a State is generally acquired by—

(1) Birth: in the case of legitimate children the father must be a member of the State, in the case of illegitimate children, the mother. This is the most general ground of State-membership. Foundlings belong to the country in which they are found.

(2) Marriage: the foreign wife becomes a member of the family and nation of her husband.

(3) Naturalisation; by which a foreigner, at his desire, is received as a member of a State. But its conditions vary very much in different countries, some encouraging, some discouraging immigration. In many countries mere settlement in a permanent domicile, with or without notification, is enough: elsewhere a special act of the administration or even of the legislative is necessary. Sometimes appointment to State offices carries citizenship with it, sometimes it does not. Many States require that the foreigner should be expressly released from, or at least should expressly resign his connection with the old State, others dispense with this condition.

What terminates membership in a State?

2. A person ceases to belong to a State by—

(1) Death. Most men remain their life long members of the State into which they were born.

(2) Marriage. The wife who acquires the nationality of an alien loses her former nationality.

(3) Discharge (*Entlassung*) from membership in nations. As this membership is now generally regarded as a personal right (*ein persönliches Recht*), it is not lost by mere settle-

ment or even by permanent residence in a foreign country. The tie is naturally severed by a twofold act, an act of resignation of rights on the part of the individual, and an act of discharge on the part of the State: this expresses the mutual character of the tie. Most modern States, however, think it unworthy for a State to hinder a man who wishes to resign his nationality, and have recognised the principle of freedom of renunciation (*freie Verzichtleistung*). In many cases, as for instance in emigration, where there is no idea of returning, the act of the individual is construed as implying renunciation[9].

English Law.

The English law, though it was among the first to accept the right of free migration, continued to retain the feudal theory that the subject cannot put off his allegiance without the consent of the prince, so that an English subject does not cease to be such by mere emigration[10].

French Law.

French law treats naturalisation in a foreign country, or entrance on the service of a foreign government[11], without consent of the French, as equivalent to emigration: this is going beyond the principle of resignation (*Verzichtleistung*), for a man may often connect himself with a foreign State without any desire to resign his connection with his own.

[9] *Code Civil*, Art. 17: 'La qualité de Français se perdra par tout établissement fait en pays étranger, *sans esprit de retour*. Les établissements de commerce ne pourront jamais être considérés comme ayant été faits sans esprit de retour.'

Austrian fundamental law of 21 Dec., 1867, Art. 4: 'Freedom of emigration is only limited by the duty of military service'; and so *Prussian Constitution of* 1850, Art. 11. The *Prussian law*, ii. 17, § 127 ff., was still stricter. By the law of the German Empire, 1 June, 1870, membership in country and empire are lost by a ten years' residence abroad. But the term is only counted from the termination of passports, etc., and may be interrupted by registration at a consulate, § 21.

[10] *Magna Charta*, 1215: 'Liceat uni cuique exire de regno nostro et redire salvo et secure per terram et per aquam *salva fide nostra*, nisi tempore guerrae per quod breve tempus, propter communem utilitatem regni.' Blackstone, *Comm.*, i. 10. By the law of 1870, St. 33 Vic. cap. 14, a British subject ceases to be such by naturalisation in a foreign State.

[11] *Code Civil*. Art. 17.

However, in case of return to France, it is easy for him to recover his rights[12].

Native rights in two States.

It is quite possible for one person to have the rights of a native (*Heimatsrechte*) in two States at once[13], and modern conditions indeed encourage this. In the rare case of a conflict of duties it may be hard to reconcile them. It is not always a safe principle that the earlier right should take precedence, especially where it is dormant, while the later right is actual. In such cases the first duty, e. g. of military service, is to the country in which a man is living[14].

It naturally follows that the State which confers naturalisation on a foreigner, or appoints him to an office, may either demand a renunciation of his old rights, or allow him to retain them[15].

Conflict of duties.

3. As the conditions of acquisition and loss of national rights differ in different countries, a conflict may arise either where two States both claim a man as their subject and demand his service, or where both refuse to receive him.

To avoid conflicts of this kind a treaty was made on Feb. 22nd, 1868, between the North-German Confederation and the United States of America, at the instance of

[12] *Code Civil*, Art. 18: 'Le Français qui aura perdu sa qualité de Français pourra toujours la recouvrer en rentrant en France avec l'autorisation du Président de la République et en déclarant qu'il veut s'y fixer, et qu'il renonce à toute distinction contraire à la loi française.'

[13] A man may even take part in the representation of two States at once. Many German princes (*Standesherren*) are members of the upper chamber in two or three States, in all of which they have estates, and have given their oath of allegiance. It is quite possible to conceive that a man should have two different domiciles, one in town and the other in the country, or one as a man of business, the other as a private person. To dispute this as Bar does (*Das internationale Privat- und Strafrecht*) is not to see that facts are wider and more varied than theory. To allow a man to become a member of a new State without breaking his connection with the old is no limitation to the right of free migration.

[14] Blackstone, *loc. cit.* My own experience has taught me that in these cases one's actual home has the first claim.

[15] *Bavarian Edict*, § 6. On the other hand, *Swiss Federal Constitution of* 1848, Art. 43: 'No canton may bestow citizen rights on foreigners, unless they have first resigned their previous rights.' See now the Swiss federal law of July 3, 1876, on naturalisation and loss of citizen rights.

Bancroft, the American Envoy. The treaty lays down that a naturalisation of five years' duration, in either State, shall be recognised by both as terminating the previous relation. The same principle was adopted between England and the United States in 1868, and has now been generally approved.

The position of a Native

4. The consequences of membership in a State belong partly to private, partly to public law. In private law the distinction between citizen and alien used to be far more important than now. The spheres of private and public law are now much more sharply distinguished, and hence nationality, which is essentially a political idea, has no place in private law. As a rule natives and aliens are alike regarded as both possessing full rights in private law [16].

a. Private rights.

The ancient principle that aliens can acquire no landed property is now only exceptional [17]. Restrictions on the exercise of certain handicrafts and of retail trade by aliens are more common [18].

On the other hand, the *Jus albinagii* (*Fremdlingsrecht*) which made the prince of a country heir to the property of aliens, and the tax levied on inheritances which went abroad (*Gabella hereditaria*), have almost everywhere been swept away, and so far freedom of migration (*Freizügigkeit*) has been generally recognised [19].

[16] *Prussian Law*, Introd., § 34: 'Subjects of foreign States who reside or conduct business in the country must be tried by the above laws.'

Austrian Code, § 33: 'Foreigners enjoy equal civil rights and liabilities with natives, except where membership in the State is expressly required as a condition.' *Code Civil*, Art. 13.

[17] For England cf. Blackstone, i. 10. Since 1870 aliens can acquire real property, Stat. 33 Vic. cap. 14. In some democratic Swiss cantons the prohibition is still in force.

[18] The prohibition was natural as long as the guilds existed: but it long outlived them. The French constitution of 1848, Art. 13: 'garantit *aux citoyens* la liberté du travail et de l'industrie.' Practically, however, foreigners enjoy liberty of trading.

[19] The *Swiss Federal Const.*, Art. 63, guarantees freedom of settlement to foreign States on condition of reciprocity. *Act of the German*

b. Public rights.

But in the sphere of public law the distinction between citizen and alien remains in full force. The following rights, except in case of special grant, are confined to natives:—

(*a*) The right of permanent residence in the country[20]. A native cannot be handed over to a foreign State, or banished, without grave political reasons.

(*b*) The right to the protection of his State, even if he is staying abroad.

(*c*) The exercise of the franchise and of the rights of a full citizen.

(*d*) The right to hold a public office[21].

(*e*) Sometimes such general political rights as those of association, petition, or free publication[22]. This does not mean that foreigners are absolutely excluded from these rights, but that they only enjoy them on sufferance.

Confederation, 1815, Art. 18. *Resolution of the German Confederation*, 1817. The German Imperial law of 1 Nov., 1867 (originally enacted by the North German Confederation), first introduced complete freedom of migration between German States: it is now generally extended to foreigners.

[20] *Swiss Fed. Const. of* 1874, Art. 70: 'The Confederation has the right to remove from its territory any foreigners who are dangerous to its safety.'

[21] *Bavarian Edict, of* 1818, § 7: 'No foreigner can hold the higher crown offices, posts in the civil service, the higher posts in the army, ecclesiastical offices or benefices, nor exercise the rights of a Bavarian citizen.'

French Constitution of 1848, Art. 10: 'Tous les citoyens sont également admissibles à tous les emplois publics.' Cf. *Austrian Fund. Law*, 31 Dec. 1867, Art. 3; *Prussian Const. of* 1850, Art. 4.

[22] *French Const. of* 1848, Art. 8: '*Les citoyens* ont le droit de s'associer, de s'assembler paisiblement et sans armes, de pétitionner, de manifester leurs pensées par la voie de la presse ou autrement.'

Prussian Const. of 1850, Arts. 27, 29, 30, 32, grants these rights to 'all Prussians.'

CHAPTER XXII.

RELATION OF THE STATE TO INDIVIDUALS.

II. Citizens.

Full citizenship.

The body of full citizens rise above the general mass of the members of a country or nation. Full citizenship implies membership in the nation, but, more than that, it implies complete political rights: it is thus the fullest expression of the relation of the individual to the State.

Its conditions have varied from time to time: in ancient Greece and Rome it depended on citizenship in the governing city, in the middle ages on freedom (*Volksfreiheit*), and later on the rights of a privileged class, and on landed property. In modern States it has often become almost coextensive with membership in the nation (*Volksgenossenschaft*).

Its limits.

The following limitations are now generally recognised:—

1. Women are excluded (see above, Ch. XX).

2. Minors are excluded, on the ground that the exercise of political rights demands mature judgment.

Some modern States fix the majority for political purposes at a different age from that of private law. There is some reason for fixing it later, for it is easier to judge clearly on ordinary matters than on politics. In France, England, North America and Italy political and civil majority are both fixed at twenty-one[1], and in some Ger-

[1] *French Const. of* 1848, Art. 15. French law of July 7, 1874. Art. 1. *Italian electoral law of* Jan. 22, 1882. Blackstone, *Comm.* i. 17.

man States also, e.g. Bavaria[2]; but in Prussia, the German Empire[3], Spain[4] and Portugal[5], the qualification for a vote is twenty-five years, in Austria[6] twenty-four. In Switzerland some cantons fix the political majority earlier than the civil, generally at the completion of the twentieth year[7].

3. Various persons are excluded whose civil status has been impaired or lost—e.g. criminals, declared spendthrifts, bankrupts, or persons in receipt of poor-relief.

Many States require further qualifications:—

Independence.

4. A certain degree of outward independence, variously defined in different States. In earlier German law the qualification was occupation of land or separate household ('a hearth of one's own'): in recent German law independent occupation and active membership in a commune. The former view has prevailed in England[8] and some States of North America, the latter has found a place in modern German constitutions[9]. It excludes all hired servants, often too the workers in factories, at least the lower class of them, and most journeymen craftsmen.

Other modern States have moved in the direction of universal suffrage, and relaxed or abolished this qualification. Such are the Swiss constitutions since 1830, the constitu-

[2] *Bavarian Law*, i. 7. 36. *Edict on native rights*, § 8.

[3] *Prussian Const. of* 1850, Art. 70: *Electoral Law of the German Empire of* 1869, § 1: 'All (North) Germans of twenty-five years of age are qualified to vote.'

[4] Electoral law of Dec. 28, 1878.

[5] *Constitutional Law of* July 5, 1852, Art. 5.

[6] *Austrian Imperial Electoral Law*, § 9.

[7] The *Swiss Federal Const. of* 1874, § 74: 'Every Swiss over 20 years of age is entitled to the franchise.' The *Zürich Const. of* 1869 fixes political majority at 20, while its civil law fixes majority at 24.

[8] In the Reform Act of 1867, the borough franchise is based on occupation and payment of rates. [30 and 31 Vic. cap. 102. The Franchise Act of 1885 assimilates the county franchise to the borough franchise, and adds a 'service franchise.]

[9] The Bavarian Constitution of 1848, *Edict on Native Rights*, § 8, requires for citizen rights not only 'Indigenat' but 'settlement in the kingdom, either by possession of taxed estates, stock, etc., by the exercise of a dutiable trade, or by tenure of a public office.' The *Austrian Imperial Electoral Law of* April 2, 1873, § 9, regards membership in a commune as independence.

tions of the French Republics of 1848 and 1870; of the French Empire, the North-German Confederation of 1867, the German Empire of 1871, and the Greek constitution of 1864. The United States are following the same democratic tendency of the age.

Property.

5. In some States citizen rights are conditional on the possession of a certain amount of property. It is quite right to make property an important factor in the distribution of voting power, but it is a violation of the idea of the State to exclude a man from the rights of a citizen on the ground of insufficient property, provided that he is morally and mentally capable of taking part in public duties, and is in an independent position. If property is interpreted to mean income or earnings, and the limit is put at a modest subsistence, there is no objection to it, but it is then equivalent to the preceding qualification. The result is the same in constitutions such as those of the United States, the Bavarian of 1848, and to some extent those of Austria and Prussia, where the franchise depends on payment of direct taxes.

Religion.

6. In Christian States, till lately, a profession of Christianity was required. Jews, Mohammedans and others, though tolerated, were excluded from political rights. During the middle ages religion and law, Church and State, were closely associated. Exclusion from the religious society meant exclusion from the political. Toleration was the utmost that unbelievers could hope for. Even within the Christian pale difference of faith carried with it political consequences. In some countries only Catholics, in others only Protestants, acquired full rights. The peace of Westphalia put Catholics and Protestants, in Germany, on an equality in civil rights, but not in political [10].

[10] *Instrum. Pac. Osn.* v. § 35: 'Sive autem Catholici sive Augustanae confessionis fuerint subditi, nullibi ob religionem despicatui habeantur, nec a mercatorum, opificum aut tribuum communione, haereditatibus, legatis, hospitalibus, leprosoriis, eleemosynis aliisve juribus aut commerciis, multo minus publicis coemeteriis, honoreve sepulturae arceantur—sed in his et similibus pari cum concivibus jure habeantur, aequali justitia protectioneque tuti.'

The German Confederation of 1815 established political equality for the recognised religious parties in Germany, Catholics, Lutherans, and Calvinists (*Reformirten*), but left the position of other sects uncertain [11].

In modern States there is a decided tendency to make the exercise of political rights entirely independent of religious creed. This is by no means entirely due to religious indifference. When the American Congress of 1789 forbade the passing of any law establishing a dominant religion, it did not mean that it was indifferent to the power of Christianity, nor did it intend to hinder the State in its duty of supporting Christian institutions [12].

Religious Freedom

The modern principle really has its root in the idea that religious belief is entirely a matter of conscience, and beyond the sphere of compulsion, and that therefore no political disadvantages ought to be attached to deviation from the Christian faith. The Americans made a sharp distinction between Church and State, and were inclined to leave both free: and in this spirit they never refused political rights on religious grounds to those who were otherwise capable. But, on the other hand, the adoption of these principles in the French Revolution, as the frequent religious persecutions of the time show, was certainly not due to regard for freedom of conscience, but rather to the negative spirit of the age, which began in frivolity and ended in savage hatred of Christianity [13].

In Germany the modern principle found definite expression in 1848, and is now recognised. The Austrian

[11] *Act of the German Confederation*, Art. 16: 'No difference in civil or political rights in the countries of the German Confederation is to follow from difference of Christian creed.' Cf. Klöber, *Acten des Wiener Congr.* ii. p. 439.

[12] Cf. Story, *Comment. on the Constitution of U. S. A.*, book iii. ch. 44.

[13] The new principle appears in the first article of the declaration of the rights of man in 1789: 'Les *hommes* naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune.' None of the later constitutions has made citizenship depend on creed.

fundamental laws of 1849 (§ 1) and of Dec. 21, 1867, on the general rights of citizens, as well as the Prussian constitution of 1850, agree with the draft of the imperial constitution framed at Frankfort and Berlin in making 'the enjoyment of civil and political rights independent of religious creed.' They prudently add that religious creed is no ground of excuse from public duties.

A law of the North-German Confederation (now of the German Empire), dated July 3, 1869, enacts: 'All existing limitations of civil and political rights grounded on difference of creed are hereby abolished. In particular, participation in communal and national representation, and tenure of public offices, shall be independent of religious creed.'

This has entirely altered the position of the Jews in these countries. In Germany, where they were before almost entirely excluded from political rights, they can no longer be refused them on religious grounds.

not yet fully realised.

But the principle has not yet been universally accepted. The Papacy has persistently condemned it. But it is not only rejected, in whole or part, by Catholic States, where the influence of the clergy is dominant: Norway[14] and Sweden still refuse to accept it. In Switzerland political rights were dependent on Christian confession till the constitutional law of 1866. Even in England, though the disabilities of dissenters, Catholics, and Jews have been removed earlier in the century, the modern principle is not yet completely accepted.

On the whole the modern State, true to the idea of its human and national basis, tends distinctly toward uniting the followers of different creeds by its common institutions, and gradually abolishing the mediæval association of public rights with definite religious conditions or ecclesiastical rules.

[14] In Norway non-Lutherans are now only excluded from the higher offices of the State. Law of July 21, 1851, on the admission of Jews; Law of June 15, 1878, with regard to alteration of Art. 92 of the constitution; and law of June 14, 1880.

BOOK III.

THE CONDITIONS OF THE STATE IN EXTERNAL NATURE. THE LAND.

CHAPTER I.

CLIMATE.

UNLIKE the lower animals, man can live and retain his characteristics in all regions of the earth. He has a greater power of resistance to atmospheric influences, and completer means for facing dangerous climates. But he is still affected both in mind and body by heat and cold, day and night. The conditions of his life change as he approaches the equator or the poles. Though the individual alters little when he travels north or south, and makes a long stay in a different latitude, climate has its effect on the mass, and in the course of generations produces changes in physique, and still more in character. Influence of Climate on national character.

The Romans in the East became effeminate, the Germans on the African coast lost their vigour, the English easily become lazy and sensual in India. Bodin (Bk. V), Montesquieu (Bk. XIV), Filangieri (I. 14, 15), and Buckle (*History of Civilisation*, I. ch. 2) have considered the influence of climate on public life, and have tried to determine its laws.

Long ago it was noticed that the hot tropical countries (up to 23° 28′) and the cold polar zones (beyond 66° 23′) are less favourable to the development of States than the temperate zones which lie between them. The latter include more than half of the solid surface of the earth, and in the northern hemisphere, where most civilised nations are situated, land and water are of nearly equal extent, whereas in other parts the proportion of water is far larger. The temperate zones.

Extremes of cold and heat.

In cold countries it is difficult for men to live in society because they cannot procure food or fuel near at hand: and the scattered families have such a hard struggle with nature for their very existence, that they have no time nor desire to busy themselves seriously with higher interests. Hot countries, on the other hand, produce indolence, only relieved by violent outbursts of the passions: they develope man's passive inclinations at the expense of his active forces. But the State, aiming at self-control and freedom, requires active and manly qualities. The inhabitants of the cold zones are independent, but are wanting in the power of political union, while those of the hot zones are readier to bear with despotism than to defend their rights or develope a free State. Bodin long ago observed (V. p. 671), 'Les peuples des régions moyennes ont plus de force que ceux du midi, et moins de ruses, et plus d'esprit que ceux de Septentrion et moins de force. Et sont plus propres à commander et gouverner les républiques et plus justes en leur action.' [cf. Arist. *Pol.* vii. 7.]

Besides 'mathematical' climate, which is expressed by latitude and depends on the relation of the surface of the earth to the sun, modern science investigates 'physical' climate. By measuring the average temperature of different places it describes isothermal lines, which do not exactly coincide with the circles of latitude, but diverge to North or South according as the temperature is modified by other factors, such as the height of the land above the sea, the neighbourhood of lakes and sea, the currents of wind and water, etc. This enables them to make more numerous and minute distinctions, but only confirms the previous experience that the temperate zones are more favourable to civilisation than the extremes.

Position of capital cities.

It is a striking fact that the capitals of nearly all important States lie in the midmost temperate zone, where the average temperature ranges between 8° and 16° C. Most European States, many Asiatic States (the isothermal curve here takes a great sweep to the South), and the States of North America

fall within this zone. It includes: Rome, 15°·4; Madrid, 14°·2; Paris, 10°·8; London, 9°·8; Vienna, 10°·5; Constantinople, 13°·7; Berlin, 9°·1; Hamburg, 8°·9; Copenhagen, 8°·2; Zürich, 8°·8; the Hague, 10°·5; Dresden, 8°·3; Munich, 9°·1; Boston, 9°·6; Washington, 13°·5; Philadelphia, 11°·9; Richmond, 13°·8; Pekin, 11°·3. Almost the only European capitals belonging to a colder zone are St. Petersburg, 3°·1; Christiania, 5°·3, and Stockholm, 5°·6; while their mean summer heat rises to 15° or 16°. Montreal, with a mean temperature of 6°·4, has a summer heat of 20°·5. The mean temperature of more southern cities, Naples, 16°·4; Lisbon, 16°·4; Mexico, 16°·6; Buenos Ayres, 16°·9; Palermo, 17°·2; Sidney, 18°·1; Nagasaki, 18°·3, is only slightly above the limit of the temperate zone. On the other hand, the mean heat of Canton is 21°·6; Cairo, 22°·4; Rio de Janeiro, 23°·1; Calcutta, 25°·8; Singapore, 26°·5; but it is worth noticing that China is ruled from Pekin, and that the civilisation of India has come from the wilder regions of the Panjâb and the Upper Ganges.

The succession of the four seasons, which is peculiar to the temperate zone, seems to act as a mental stimulus: by giving men frequent change of scene and of occupation.

Within the temperate zone we find the same distinctions on a smaller scale. Even within the same country we find intelligence and sobriety, muscular strength and endurance in the cooler regions; cunning and imagination, passionate and excitable temperament in the warmer. We see this at once if we take Italians, French, Germans, and Russians, and compare the Northern population with the Southern in each country, comparing, of course, not individuals but masses. Bodin goes too far in saying that the Northern nations beat the Southern in war, but are beaten by them in diplomacy. But the distinction between the Northern and Southern population of the temperate zone is a real one, and the statesman will do well to take account of it.

Politics can do very little against the evil effects of

Climate and legislation.

climate; the forces of nature are too strong for them. The statesman must do what he can to use the advantages of climate and to avoid its evils. Education and law can do something. Legislation will vary with the vices which the different climates encourage: but it must also consider the necessities of different climates. For instance, labourers in cold regions need more meat and drink than in warm regions, and strong liquors which are dangerous in the latter may be necessary in the former.

Hence Mohammed's prohibition of wine is suited to Arabia, but absurd for Europeans. In the cooler regions labour may be left to itself: in the warmer it may be necessary to encourage it. But in spite of all modifications produced by climate, human nature remains at bottom the same in all zones, able to cope in some measure with the difficulties of any climate. Men of energy and good endowments are not much troubled by it.

Where there is any question of founding or removing a capital[a], considerations of climate are of great importance. Otto III made a great political blunder when he wished to make Rome the capital of the German empire: and it is not a happy idea to govern India from Calcutta. There is much to be said against the choice of Berlin as capital of Prussia, but it is far better than Königsberg. The temporary choice of Florence as capital of the kingdom of Italy was good in this respect, that its climate, being a happy mean between the severity of Turin and the softness of Naples, is well suited to maintain the equilibrium of the national character.

[a] [For Aristotle's view as to the best situation of a city, written of course only with reference to Hellenic countries and to very small city-states, see *Pol.* vii. 11.]

CHAPTER II.

NATURAL FEATURES.

SINCE Carl Ritter, geographers have paid more attention to the connection between the configuration of a country and the civilisation of its inhabitants. But the Greeks had noticed it long before[a]. The fact that the earliest great civilised States are found in river valleys—in the Panjâb, on the Upper Ganges, the Nile, the Tigris and Euphrates, and the Pei-Ho—leads to the conclusion that life on a great stream is specially adapted to the early development of human powers and human thought. As he builds ships and cuts canals, and makes the stream serve him, man gains confidence and wealth; and life upon the water developes the love of adventure and commerce. For the same reason, islands and countries with a seaboard develope early. The ancient pre-eminence of Greece and Italy, the success of Spain and Portugal in the west, the early development of free states in England and Holland, were largely due to their maritime position. If it costs man greater labour and effort to subdue the sea to his use, its influence is more powerful than that of the stream.

Rivers.

The Sea.

Mountain countries have a peculiarly strong influence on character and feeling. The varied grandeur of the mountains, no less than the awful power of the ocean, elevates and strengthens men's minds. The dwellers on the mountains are obliged to exert their power to the utmost every

Mountains.

[a] [Arist. *Pol.* vii. 5, 6.]

day: this gives them a strength and a power of self-help which makes men of them. Then the broken character of a mountain country, with its many secluded valleys, favours the rise of small communities, which grow up in sturdy independence, and are firm to resist invasion. Persians, as well as Israelites and Arabs, the tribes of the Caucasus no less than the Greeks, Swiss and Samnites, exhibit the same characteristics. But the spirit of freedom takes a different colour from the sea and the mountain. In the mountains it is stubborn and resolute, by the sea it is excitable and fickle. It was the peculiar fortune of Rome to enjoy the influence of mountain and sea at once [b].

Inland countries.

Inland countries, especially with broad plains, develope more slowly, because there is no natural stimulus: the State developed later in France than in Italy, later in Germany than in England.

Worst of all is the position of plateaus far removed from the sea, with no great rivers or mountains, but only broad steppes or deserts. Compare Europe with Africa, the interior of Asia with its coasts, Western Europe with Eastern, and the difference is plain at once. In such countries despotism has always found stupid and unresisting obedience.

Man's power over nature.

The statesman cannot produce these natural conditions, but he has more power over them than over climate. He cannot move mountains or conjure the sea to his country; but he can make rivers navigable, cut canals, build roads and railways, and spread a net of telegraphs. He can enliven the monotony of a country by commerce, and connect inland countries with the ocean. Civilisation here has before it, and will finally accomplish, the great task of

[b] [Cf. Wordsworth's Sonnet, *Thought of a Briton on the Subjugation of Switzerland*:—

'Two Voices are there; one is of the sea,
One of the mountains; each a mighty voice;
In both from age to age thou didst rejoice,
They were thy chosen music, Liberty!']

uniting all parts of the habitable globe in one unbroken and fruitful bond of union.

Thomas Buckle called attention to the influence of more temporary and changing phenomena. Here again the scenes of sea and mountain make a deeper and more striking impression than those of the inland plain: but there are other influences besides. In the tropics, nature often appears so overpowering, that, in despair of conquering her, man gives up all effort: and his fancy sees nothing but the awful force of nature; his heart is filled with fear and superstition.

Violent snows, the march of glaciers, and fall of avalanches in mountain regions, the heavy rains and floods, the terrific storms and hurricanes in many hot countries, the rapid change from luxuriant vegetation to parched desert, the desolating swarms of insects and the peril of wild beasts—all these influences may depress and confound, instead of stimulating, those who live among them. For this reason, a temperate country is best adapted for the growth of man's mind. A monotonous climate is not stimulating enough: a violent one shocks him. He needs a varied and temperate climate to excite his thoughts and call out his effort: his mind, which would run riot in the tropics, then develops with an orderly and rational growth.

Advantage of a temperate climate.

But we must not exaggerate the importance of natural phenomena. After all, less depends on them than on the moral and intellectual education of man by man. Even in hot countries reason may be educated and fancy curbed by a feeling for the beautiful: and superstition may grow rank and thought be choked under a temperate sky. Man is not the creature of natural forces: he must face nature boldly and independently, making use of her when she is kind, and combating her when she is cruel.

CHAPTER III.

THE FERTILITY OF THE SOIL.

WHERE the soil of a country is fertile it is easier to support life: and population increases in proportion. It might appear that a fruitful soil was the most favourable condition for the welfare of society and of the State. This thought gave birth to the idea of a blissful Paradise, where rich and varied fruits grew ready to man's hand: and even now this is the ideal of the childish and the indolent. But riper years and human effort bring with them a contempt for a condition which has no conception of the true end of life, the development and perfecting of man's nature.

Barren soil.

Certainly a very barren soil is unfavourable for social life: for man is then obliged to procure his food from a distance, by means of commerce. In such cases commercial cities may rise and flourish, as did Venice, the daughter of the unfruitful sea. But the peoples as a whole in barren countries can only live poorly and painfully; the population is sparse and has but a meagre growth. A fixed home is hardly possible; men live a nomadic life in scattered families and hordes. Buckle has pointed out that the Mongols and the Tartars made little progress on their own barren steppes, only developing a civilisation in the richer soil of China and India: and that the Arabs did not become an advanced state till they left Arabia for the fruitful lands of Persia and the coast of the Mediterranean. The slow development of the State in cold climates is not

merely due to the difficulty of procuring warmth and the severe struggle with nature, but also, and largely, to the barrenness of cold countries. The same effects are to be found in those hot countries, where the apparent fertility is great, but is marred by frequent and sudden catastrophes, e. g. swarms of insects, or floods. For social life is just as much hindered by difficulties in gathering and preserving rich crops as by absolute scarcity of produce.

Fruitful soil tends to produce

A very fruitful soil, which furnishes sufficient food without requiring labour, is better than an unproductive soil, but it is by no means the best basis for the State, for these reasons :—

(1) Indolence.

The main motive to human effort is the desire for subsistence. If this is removed by the bounty of nature, men work little, or not at all ; and generally sink into indolence and sensuality. Where they do not work, men fail to develope the hidden resources of their nature, and society does not advance. On many tropical islands the people live a happy sensual life, but remain uncivilised. Naples made a great advance when she converted her idle lazzaroni into industrious labourers.

(2) Degradation of labour.

Where labour is not needed, labour and labourer are despised ; the life of the mass of the people counts for nothing. Nowhere is human life so brutally disregarded as in the negro despotisms of Africa, where the soil is fruitful without tillage, and there is no industry to ennoble labour.

(3) Inequality of property.

Great fertility of soil promotes an unequal distribution of property. We find a few rich men, living in superfluity, hardly any middle class, and a great mass of poor and servile population. As there is no check on population in such countries, it increases rapidly. But an occasional famine or invasion reduces the careless population to misery. Those few who have had the providence to hoard their fruits, compel the masses to surrender their fruit-trees and their land in return for food. Military leaders, in return for their protection, exact taxes and service : priests, who reconcile the gods and invoke their blessing, receive

large estates from the faithful. Thus there gradually arises a class of rich landlords and princes, of nobles and priests, who own the whole country. They attain to some degree of civilisation and to great material wealth. They exact labour from the subject classes, but hold them cheap, because there are plenty of labourers, and man, as such, has no value. The masses become poor, despised, and completely dependent: they live a dull and brutal life of service, completely cut off from any civilising influence.

India. Buckle was the first to lay proper emphasis on these facts, and to establish them historically. But he certainly goes too far when he explains the early Indian civilisation and the system of castes by this cause, and maintains that higher civilisation pre-supposes superfluity. Like all Englishmen, he lays too much stress on economical conditions. The fact is, that the most eminent Brahmans and Buddhists preferred poverty to wealth, the Kshatriyas loved power and honoured courage more than wealth, while the Visas, who did not belong to the aristocracy, set a high value on the wealth that they amassed by industry, trade, and usury. The Sudras were reduced to a servile condition, not because they were poor, but because they were a conquered population of inferior race.

Still, it is true that the luxuriant rice plantations easily support a large population, so that, as the land gradually became the property or the fiefs of princes and nobles, the contrast of few rich and many poor was developed, and has lasted up to the present day: on the one side, a small and highly civilised body, enjoying great material comfort; on the other, a despised and oppressed multitude.

Egypt. The same was the case in Egypt. There the date-palm yields a large harvest without much attention. The vast buildings of the kings point to an enormous expenditure of strength and human life. The Hebrew records describe the miserable condition of the servile labourers. Joseph's advice might be of service to the treasury of Pharaoh but it was disastrous to the people.

Mexico and Peru.

Again, in Mexico and Peru, we find a small body of rich and powerful men exploiting the masses, and again the mischief is partly due to the seeming bounty of nature, which produces maize, bananas, and potatoes in abundance. Naked slavery below, arts and tyranny above, external weakness, gigantic buildings and poor hovels, such is the picture of these favoured lands.

Can statesmen remedy this evil? They can if they are seriously devoted to the work of advancing a healthy national life. In spite of a fertile soil, it is possible to protect the lower classes against the upper, and to educate them to be free men, to promote a better division of property, and raise the middle class.

Moderately fertile soil the best.

The most favourable soil then is one of moderate fertility, which requires the expenditure of serious and persistent labour. There labour and the labourer are properly valued, but they are not overtasked, and there is no destitution. Man's powers are developed, and the conditions of life perfected: families enjoy a secure existence in moderate prosperity, and wealth is so distributed that the middle class is numerous and well to do. One class shades off gradually into another: there is no danger of the lower classes being enslaved, nor of the higher becoming a privileged caste. There is a great diversity of occupations, but the people form a coherent whole, animated by a common spirit.

Doubtless history proves that these conditions do not necessarily lead to an equal division of wealth and a healthy national life, and there are many other more powerful factors involved. But if we compare Europe with Western or Southern Asia, or North America with Central and Southern America, or even South Italy with Lombardy and Switzerland, the superiority of such conditions becomes evident. The main business of the State in this sphere will be to defend healthy natural conditions against human interference, and to maintain an equilibrium of forces, so as to promote mutual aid and advancement. Legislation and

Legislation.

economy may help in saving the soil from desolation or exhaustion, and may prevent the accumulation of land in a few hands, especially in mortmain, and secure a natural distribution of wealth. It may sometimes transform a barren soil into a fertile one, and so increase the production of the country by providing for the drainage of marshes or the irrigation of meadows.

CHAPTER IV.

THE LAND.

As the State has its personal basis in the people, it has its material basis in the land. A people does not become a permanent State till it has acquired a territory.

The part of the earth which the nation occupies, or which the State governs, is called its land or territory (*Statsgebiet*). Its extent, like the development of the nation, is determined by historical events: for the legal existence of the State it is unimportant. There have always been small monarchies and republics, and they have maintained a certain degree of equality by the side of their greater neighbours. It is, therefore, absurd to try to fix a normal limit for the territory of a State. The Greek city-states looked petty in face of the Roman Empire, but Athens takes her place beside Rome in the history of the world. But still the extent of a State has a great influence on its political character and importance, and is closely connected with many grave political questions. The State and its Territory.

Obviously these two necessary elements of the State, the land and the people, react on one another. The land may be too small for the people, inadequate to supply its intellectual and material wants. The growth of population may lead to the foundation of colonies to receive the surplus. Or the sense of power or the requirements of its civilisation may demand an extension of territory, and lead to annexation or conquest. In this case it is hard to reconcile the

natural right to growth and self-development with the historical rights of other nations.

Again, when a State becomes too small to maintain a secure existence, in the face of other growing States, it may either ally itself with other States, or allow itself to be absorbed by a more powerful State.

On the other hand, a sparse population may feel its territory too wide, or some particular part of it may desire to be independent. In the first case the State will encourage immigration, in the second it will adopt a policy of separation or dismemberment.

Tendency to large States

Here the present age differs entirely from the middle ages: then the general tendency was to small States, now it is to large ones. Then Italy, France, Germany, Spain, and at first the British Isles and the Slavonic countries, were all divided among a number of petty monarchies and republics. The unity of the Roman Empire was ideal rather than actual. The tendency to form larger States began with England, and is seen on the Continent after the latter part of the fifteenth century, and has not yet reached its limit.

The mediæval States were innumerable. Almost every lordship, many towns and religious houses, and even villages, maintained an independent political existence. Only a few of these constitutions now remain, and there is small prospect of their survival. Many influences co-operated to substitute this infinite partition for the old unity of the Roman ideal:—want of roads and posts, and of means of locomotion; the tendency to special rights (*die particuläre Rechtsbildung*), the defective system of police, the feudal constitution, with its limited military service and defective means of war, the narrow circulation of money, the separation of estates, the fundamental conceptions of dynastic rule and private law, the want of a national consciousness, and the Teutonic tendency to independence and to corporate organisations. On the other hand, the formation of large States has been promoted by the improvement and extension of means of communication, high-roads and rail-

promoted by modern civilisation.

ways, steamships, postal and telegraphic service, the quickened impetus of trade and commerce, increased military and financial resources; in a word by the entire development of modern civilisation and the awakened national consciousness and more rational legislation which it has brought with it.

Limits to the size of a territory.

The modern State needs a broader basis than can be found in a mere municipal or judicial district. As privileged class (*Stand*) and tribe have had to give place to people and nation, so towns and manors have to merge themselves in the wider unity of the country: only so can the conception of a Nation (*Volk*) supersede the conceptions of local citizenship or narrow association. A Country and a Nation are both essential to the modern idea of a State: without a country the State is at best insecure and ineffective; it may be retained for a while as a curiosity, but being quite cut off from modern life it is exposed to the general hatred of the small-state system (*die Kleinstaterei*). This principle fixes the lower limit for the size of a State. Its higher limit is determined by the principle that every part must be within reach of the central authority. But this limit of course is an elastic one. Since the invention of steam-locomotion and the telegraph, no country is too remote for communication with its capital. It can no longer be denied that it is possible to unite the whole globe in one political organisation, now that international law, with its hypothesis of the union of many States in one humanity, extends over the greater part of the inhabited earth. Of the total land surface of the globe, estimated at nearly 54,000,000 square miles, Great Britain governs nearly 9,000,000 square miles, Russia about 8,300,000 square miles, China 4,500,000, the United States over 3,000,000 square miles. Here are vast and distant territories, which are still animated by one political spirit.

Population more important than area.

But the power of a State is not to be measured by its mere extent. The German Empire has a territory of about 210,000 square miles, and yet is the most powerful State in

Europe. France, with its 204,000 square miles in Europe, is at least as strong as Russia, whose territory in Europe is ten times the size. The European territory of Great Britain only covers 121,235 square miles, but from this it governs colonies and dependencies far larger than itself. Population is a far more important factor in determining the power of a nation than extent of territory, though the latter is not without weight.

The further a territory extends, the greater becomes the difficulty of movement, and hence also of government. Its scattered forces can only be slowly collected, and its distant provinces are not under perfect control. Improved means of communication have lessened this difficulty, but not removed it. The word of command can be flashed to the farthest limit of the State, but it lacks the emphasis of immediate authority: and it may be misunderstood, or, if the subject is unwilling, evaded. Even with railways it takes time to convey men, and food, and stores: and in thinly populated provinces it is not always possible to establish railways: often even highways are wanting.

Hence, an extension of territory does not always mean an increase of power. A State may be weakened by its conquests, if the smaller territory was easier to govern.

Strength and weakness of large States.

It is easy to annoy a State of wide extent by attacking it at different points, but it is hard to gain any permanent success against it. The enemy can traverse wide tracts unopposed, but they will find it difficult to maintain themselves. Their only chance is to attack and defeat the concentrated power of the State. This assertion is confirmed by the recent wars in Russia and North America. But while great size in a State may make it helpless and cumbrous, it has its advantages. A large State has command of vast resources, which are not exhausted in a moment: hence, in a dangerous crisis it can afford to wait and watch the turn of events: it can seldom be conquered at a blow. The size of a State also has an influence on the form of its constitution. Direct democracy is only possible in a small country,

Influence of size on Constitution.

where men can meet frequently in the assembly. Constitutional monarchy requires a larger area for its representative system. The vast extent of the Roman Empire was a main reason of the decay of the Republic and the concentration of authority in an absolute Emperor. In Russia too the absolute power of the Czar is partly due to the vast mass of its territory, and even England does not propose to give India parliamentary institutions.

Accordingly the constitutional policy (*die Verfassungspolitik*) of a State must consider the character and extent of its territory, and adapt itself to it.

The territorial limits of a State are not eternal or unalterable. They depend on the growth or decay of national forces. But still they are more fixed and permanent than the limits of its population, and are only altered from time to time by great events.

Boundaries.

The boundaries of a State may either divide it from a foreign State, or from a part of the earth which belongs to no State. In the first case the boundary is regarded as a fixed line, and is marked by stones, trenches, walls, &c. In the latter case there is no need to draw a strict line: the boundaries may be advanced or withdrawn without complications with other States. To the first class belong:—

(*a*) Rivers and streams, although these are not so absolutely fixed as land boundaries. The strict frontier between the two governments is fixed either at the middle of the river, or in the bed of the river proper (*Thalweg*), i. e. the channel which it takes at its lowest; but as the mid-channel is that chiefly used for navigation and commerce, it is considered as common to both States for these purposes. But both these boundaries may be altered by the alluvial or denuding action of the water on the banks, or the alteration of the course of the stream.

(*b*) Mountains: these generally separate distinct tribes and ways of life: communication is rare, and only by single passes.

As a rule the highest ridge of the mountain, or the watershed, is regarded as the natural boundary.

To the second class belong:—

(*a*) Seas and large lakes, which are naturally subject to no State, and are open to the common use of all the world.

(*b*) Deserts and steppes, and sometimes forests and savage mountains. But these regions are appropriated as civilisation advances. Further definition of boundaries belongs to International law.

Union of several territories.

Sometimes several countries are united to form a new and larger whole, an Empire (*Reich*). This may happen in various ways.

(*a*) The countries united retain their existence, and on a footing of equality: e.g. the United States of America, the German Empire.

(*b*) The countries exist separately, but on an unequal footing, one being regarded as imperial (*Hauptland*), the others as dependent (*Nebenländer*): e. g. Great Britain with its colonies and dependencies, France with Algiers.

(*c*) The previous countries become provinces of one Empire: e.g. the spread of Russia.

The Ideal Territory.

But as the ideal basis of the perfect State is not the nation, but humanity, so its ideal territory is the whole earth, uniting in one harmonious whole the diverse qualities of different countries, so as to complete and enrich one another. But the practical principle for present politics, which are still far from the goal of the ideal, is this: that a varied territory is the best for a State: one where there are mountains and valleys, rivers and lakes, seaboard and plains; not that such countries are more fertile, for in some parts the difference of level makes cultivation impossible, but because the various faculties of the inhabitants are thus stimulated and developed to the utmost. On the other hand, the worst is an inland territory of wide and desolate steppes: that is why these regions have always been the home of nomad tribes which fall short of political life.

CHAPTER V.

TERRITORIAL SOVEREIGNTY.

State property.

THE sovereign rights of a State over its whole territory are often called 'State property' (*Statseigenthum*). But the name, though not inappropriate to the early States of Asia, or to the feudal State, is incompatible with modern political ideas.

In the old Jewish State Jehovah, in Egypt the Pharaohs were regarded as sole proprietors of the soil, and private persons only enjoyed a transitory use of it: in the Roman Empire, again, the land of the conquered provinces was regarded formally as the property of the Roman nation or Emperor, and the provincials only enjoyed an inferior though actual property (*in bonis*) in the land. In some mediæval States, e. g. in England after the Norman Conquest, the king was the supreme proprietor and feudal lord of the whole land, and his subjects only occupied their estates as fiefs. In all these cases the idea of State-property naturally arose from the fusion of the idea of private property with that of political sovereignty. But it becomes untenable now that private and public law are entirely distinct.

State sovereignty;

We must distinguish then the sovereign rights of the State in its territory (*Gebietshoheit*, *imperium*) from the property (*dominium*) of the State. Property is a matter of private law, even when it belongs to the State: sovereignty is essentially political, and can only belong to the State, or the head of the State[1].

[1] The ancients recognised this distinction. Hugo Grotius, *De jure*

its consequences

1. On its positive side this sovereignty means that the State has complete power over all its territory, to enforce its laws, execute its decrees, and exercise its jurisdiction. Its power extends not only over persons but over land and things; but this power belongs to the State alone, and is outside the sphere of private law.

2. On the negative side, the State has the right of excluding every other State or power from sovereignty in, or interference with, its territory. Hence the modern State does not allow any foreign power to exercise jurisdiction or police in its territory. Alienation of the whole or part of a country is incompatible with this political conception of territorial sovereignty. It is no longer possible to do as the mediæval princes did, who sold, or pawned, or partitioned[2] their domains as pieces of private property.

Modern public law adheres to the principle that the territory of a State is inalienable and indivisible[3].

Alienation is only possible (exceptionally) under the forms of public law, in virtue either of a law or of international contracts, including treaties of peace[4].

Grotius further demands as a consequence of natural right, that if part of a country is to be alienated, the consent of the inhabitants of that part must be given, as well as that of the whole State. This demand is a just one, because their whole political existence is at stake, and the legislature cannot be supposed to represent them properly when it is bent on dissolving the union of the State. But

belli ac pacis, ii. 3. § 4, quotes Seneca, *De benef.* vii. 4, 'Ad reges *potestas* omnium pertinet, ad singulos *proprietas*,' and Dio Chrysost. *Orat.* xxxi, ἡ χώρα τῆς πόλεως, ἀλλ' οὐδὲν ἧττον τῶν κεκτημένων ἕκαστος κύριός ἐστι τῶν ἑαυτοῦ.

[2] Instances in antiquity only occur in cases where the prince had absolute power over land and people. Cf. Hugo Grot. i. 3, 12.

[3] *French Const. of* 1791, ii. § 11: 'Le royaume est *un* et *indivisible*.' For German States see Zachariä, *Deutsches Stats- und Bundesr.* i. § 83.

[4] *Prussian Const. of* 1850, Art. 2: 'The limits of this country can only be altered by a law.'

in most cases necessity will prove too strong for natural rights[5].

Limitations on the sovereignty of the State in favour of other States (*statsrechtliche Dienstbarkeiten*) are possible, and are analogous to the 'servitudes' of private law. But they must have their basis in public law, and their purpose must be a public one. For instance, a State may allow a neighbour the use of a military road across its territory, or of its postal system, or may open its ports. But freedom of sovereignty must be guarded against encroachment, even more jealously than freedom of property in private law: for any permanent limitation is a disastrous injury to the unity and harmony of the State, and to the free development of its institutions in the interest of public welfare[6]. and limitations.

Notes.—1. The change of the title of the French kings from *Roi de France* to *Roi des Français*, after the Revolution, was a protest against the earlier idea that France was a *patrimonium regis*, and so far marks an advance in political thought. [The title of *Roi des Français* was introduced into the constitution of 1791, and it was given to Louis Philippe by the French Chambers in 1830. But it was not held by Louis XVIII and Charles X, who, like their predecessors, were *Rois de France*.] But when once the significance of territorial sovereignty is realised, it does not matter which form is used. Stahl (*Statslehre*, ii. p. 38) goes too far when he calls the national title barbaric. Roman and German Emperors have preferred it: and it is nobler than a territorial title in as much as a nation is greater than a country.

2. Rectification of frontier is not included under alienation, as it merely defines the existing boundaries. But it is not mere rectification when whole tracts of inhabited country are cut off and exchanged by a State to round off its frontiers.

[On the conception of territorial sovereignty see Maine, *Ancient Law*, p. 103 ff.]

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[5] Hugo Grot. ii. 6. § 4 ff. Cf. Final Act of Vienna of 1820, Art. 6: 'Voluntary resignation of sovereign rights over the territory of a confederation, except in the interest of a member of the confederation, must have the consent of all members of the confederate State.' For fuller treatment of the question see Bluntschli, *Modernes Völkerrecht*, § 286.

[6] Schmitthenner, *Statsrecht*, p. 409: 'Private property of a foreign State or sovereign, in the territory of a State, does not limit the authority of that State.'

CHAPTER VI.

DIVISION OF THE COUNTRY.

GENERALLY, the territory of a State is so large that it has to be divided for purposes of government. There are four chief kinds of division:—

1. Provinces. 1. Provinces. The provinces of the Roman Empire were originally independent States, which had been made subject to Rome. Modern provinces also often represent earlier States, which have been merged in a larger whole: but sometimes they have been created by the State to which they belong: and often, as in the German Empire, the provinces (duchies) have given rise to new countries.

The characteristic feature of provinces is their comparative independence. Their government is subordinate to the general government, but has comparatively extensive independent powers. Further, in representative constitutions they sometimes have a legislative body for the conduct of their own affairs, a provincial parliament. The modern tendency to unity is unfavourable to this division. The separate legislative powers of the provinces have been abolished in France, Spain, and England, and in the 'Crown-territories' (*Kronländer*) of Austria limited to the sphere of economics and education. But though thorough unity of organisation is to the advantage of a State, the complete abolition of provincial freedom, ignoring, as it does, the special wants and characteristics of different districts, may injure healthy and fruitful elements in the national life. The Teutonic nations feel the want of pro-

vincial independence more keenly than the Romance nations.

2. Circles (*Kreise*) are large political districts, but have no claim to be considered as separate countries. In the old Frankish and German imperial constitution, the duchies and princedoms corresponded to provinces, the cantons (*Gaue*) to circles. Under the same head come the counties of England and the United States, the German *Kreise*, the French *départements*, and the Prussian *Regierungsbezirke*. 2. Circles.

This division is founded not on local or tribal differences, but on the necessity of an organised administration. But still the historical associations of the district and its natural means of communication have to be taken into account. Provinces may be compared with the different buildings of a castle, Circles with the storeys of a house.

They generally have some central power of administration and superior jurisdiction. Further, there is now a tendency for the population of a Circle to attend to its own special interests, and to organise common institutions, e. g. roads, magazines, hospitals, schools, poor-houses, prisons. This opens up a fruitful field for self-government and representative institutions[1].

3. Districts (*Bezirke*) are generally subdivisions of Circles, and have a subordinate administration and jurisdiction. These, again, may be recognised as corporate bodies, with property and institutions of their own[2]. 3. Districts.

Such was the position of the Teutonic hundreds (*Centenen*, *Huntari*), the provincial courts (*Landgerichte*), and bailiwicks (*Oberamteien*) of Germany, the *Cantons* of France, and the *Kreise* of Prussia.

Mere electoral districts do not belong to this category, as they are only temporary, and form no organic part of the State. Such inorganic divisions have little to recommend them.

[1] Cf. Vivien, *Étud. ordin.* ii. 6.

[2] Vivien, *op. cit.* ii. 3. The cantons in France do not form corporations, but only official districts for judicial and electoral purposes.

4. Communes.

4. Communes (*Gemeinden*) in town and country. These form the simplest division in the State, but they are of vital importance. The personality of the commune (*die persönliche Gemeinde*) is to its district what the organised nation is to its country. It inspires it with its common life; not, indeed, a life of political activity, but of common social and economical interests.

Large cities are equivalent to districts, great capitals to circles, or even to provinces (e. g. Berlin).

Principles of division.

Alterations in the political divisions of a country are a question of law. In all these grades the State has to guard its common interests and the harmony of its organisation. But in the higher grades the influence of public interests is greater, and the State has more freedom in determining the divisions. The commune, on the other hand, is naturally so intimately bound up with existing corporations, that their wishes have to be considered.

The chief considerations which determine the State in these arrangements are:—

(*a*) The political purpose of the division.

(*b*) Natural influences, such as the connection of river valleys.

(*c*) The history of the inhabitants.

(*d*) Commercial relations.

Mathematical considerations of number or area are subordinate to all these.

CHAPTER VII.

THE RELATION OF THE STATE TO PRIVATE PROPERTY.

The history of Property.

PRIVATE property, i. e. the command of man over wealth, is as old as man[a]. When primitive men plucked the fruits for their food, or chose a cave for their home, or even when they clothed themselves with leaves or skins, they were acquiring property.

Property is not primarily a product of the State. In its earliest, and incomplete, and insecure form, it is the work of individual life, a sort of extension of the physical existence of individuals. A man gains possession of things which lie around and come into his power, he turns them to his own use and service, appropriates them. When to this he adds a consciousness of his right to possess them, the idea of property is complete. Even the nomad, who has no fixed political bond, has property in his clothes, his arms, his flocks, and his furniture. Even Robinson Crusoe, on his desert island, extended his property.

Communism.

Communism, which denies the justice of private property and declares it to be robbery[1], conflicts with the nature of man as created by God: 'Let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth;' Gen. i. 26. It is also at variance with the whole history of mankind, which recog-

[a] [See Émile de Laveleye, *Primitive Property.*]
[1] Proudhon, 'La propriété c'est le vol.'

nises property among all nations and at all times, and is still engaged in developing it.

The abolition of property, which communists propose, would mean the death of individual freedom, the destruction of civilisation, and of the family; in a word, a barbarism worse than that of the rudest society [2].

Socialism.

The doctrine of the socialists is more temperate and humane, but equally absurd, and less consistent. Fröbel may be taken as representative of this view. Property is a 'fief held from society by the occupant:' the right of the individual is a 'consequence of a common will (*Gesammtwille*) recognised by a number of men who form a sovereign society [3].' This doctrine is no less false than communism to the individual nature and freedom of man: recognising, as it does, only derivative and transitory possession, it proposes to replace free property by an exaggerated parody of mediæval feudalism, i. e. to return to a lower stage of civilisation: for it is only dressing up in democratic phrases the same theory of servitude which in the dark ages produced an abject flattery of arbitrary despotism.

The State protects property.

The State has no absolute power over private property, which lies indeed, as such, outside the range of public law. The State does not create or preserve it, and therefore cannot take it away. It simply protects it, as it protects all individual rights, and has the same authority over it as over its inhabitants. The main principles governing the relation of the State to private property are accordingly—

1. The State guarantees the security and freedom of property [4].

[2] Cf. Thiers, *De la propriété*, ii, who is excellent as a critic of communistic and socialistic systems, but not successful in his philosophical derivation of the idea of property.

[3] Fröbel, *Sociale Politik*, ii. pp. 392 and 400.

[4] This principle finds expression in many constitutions. The re-issue of Magna Charta by Henry III, 1225, contains several clauses to this effect. The French republican constitution of 1848, Art. 11, and the Charter of 1814 (Art. 8) contains the clause 'Toutes les propriétés sont inviolables.' Prussian Const. of 1850, Art. 9, 'Property is inviolable.'

2. The State has no arbitrary power of disposing of property.

3. The State has a right to tax property for public purposes.

This does not exhaust the relations of the State to private property. Its rights are extended by certain limitations on the freedom of private property.

Limits of private property.

1. Certain things are naturally unfitted to become private property, and are reserved for general use. Such *res publicae* are rivers, sea-coasts, harbours[5].

Under this head come the unproductive regions of snow and glaciers, impassable gorges, and moors, &c. But glacier-ice may become an article of commerce, and hotels have been built on Alpine peaks. In such cases the ownership is derived from the State. By the side of such natural gifts come such works of the civilised State as are devoted to public service, especially public roads and canals, public spaces, &c. All these are *res publicae* (*domaine public*), and so long as they remain such, cannot be owned as private property even by the State, though the control of the State over them is sometimes termed property.

2. There are other things, which, though naturally capable of being held as private property, are reserved because they have a close connection with the public welfare, or because their management demands more extensive resources than private owners can usually control. To this class belong mines, salt-works, and other monopolies.

3. Distinct from public property in the narrow sense, are things set apart for particular public uses, especially public

[5] Marcianus in Dig. I. Tit. 8, *de div. Rer.*: 'Flumina paene omnia et portus publica sunt.' Ulpianus in Dig. xliii. Tit. 12: 'Publicum flumen esse Cassius definit, quod *perenne* sit.' The conception of a public river is narrower according to Code Civ. art. 538: 'Les chemins, routes et rues à la charge de l'État, les fleuves et rivières *navigables ou flottables*, les rivages, lais et relais de la mer, les ports, les havres, les rades, et généralement toutes les portions du territoire français qui ne sont pas susceptibles d'une propriété privée, sont considérés comme des dépendances du domaine public.' See also *Sachsenspiegel*, ii. 28. § 4. *Prussian Law*, ii. 15 §§ 38, 41. *Austrian Code*, § 407.

buildings, official residences, fortresses, arsenals, barracks, &c. Such things may fitly be spoken of as property, but their employment in the public service removes them from the sphere of private property and exchange. They must remain under control of the State (*domaine public relatif*) in order to be available for public purposes.

4. The fact that most real property was originally derived from the State, which divided the conquered land among the warriors or families of the tribe, has this consequence in many States—that when property in land is extinguished by emigration or death of a family, the land reverts to the State. Even still, English and American law hold that land in new colonies belongs to the State, and must be bought from it by the colonists. This treatment of land, which is not yet, or has ceased to be private property, is justified by the principle of territorial sovereignty, which regulates private ownership, and exercises full authority in its absence[6]. Vacant inheritances revert in the same way; here, occupation by the first comer would produce great confusion.

But only a false conception of the State could lead to the idea that the State has a natural right to property in everything in its territory which is without an owner, to the exclusion of all aliens.

Survival of the idea of State ownership.

Roman law took a truer view: the State had no more right to '*res nullius*' than any private person. Alien or citizen might occupy them, and became owner by this occupation[7]. On the other hand, in the middle ages the notion of feudal sovereignty favoured the extension of State-ownership to objects of private law, and this view has survived in many modern systems.

(*a*) Prussian law gives the State a prior right of occupa-

[6] Cf. Pierantoni, *Diritto Costitutionale*, Napoli, 1873, i. p. 306 ff. *La proprietà dello Stato.*

[7] Justinian, *Inst.* ii. 1, 12: 'Quod enim ante nullius est, id *naturali ratione* occupanti conceditur.' Cf. Gaius, ii. § 66. Klöber, *Oeffentl. Recht des deutschen Bundes*, § 337, has put forward the theory that ἄδεσποτα cannot be occupied by foreigners within the State. But why should not a foreigner who catches a bird that flies into his room have as much right to it as a native?

tion in the case of certain unclaimed or abandoned property, especially land, cattle, &c.; and no one can occupy without the State's permission. But in other things it allows a free right of occupation[8].

(*b*) English law makes the king owner of most unclaimed property[9]: but it still recognises a free right of occupancy for certain moveables[10].

(*c*) French law is like the English. It states the general principle, 'Les biens qui n'ont pas de maître appartiennent à l'État[11].'

(*d*) Austrian law adopts the view that things without owner (*freistehende Sachen*) may be freely appropriated[12].

5. Limitations arising from the supreme sovereignty of the State over land and people, and its obligation to protect the continuous and successive existence of members of the State. To this belong taxation and all police regulation of private property.

6. Limitations arising from the right of expropriation (*Enteignung*). It is generally assumed that the right of expropriation was not recognised by the Romans, and that, therefore, freedom of property was unconditionally protected even where the public advantage demanded the cession of property. It is quite certain that they did not admit any universal right of cession (*Abtretungsrecht*). But still, their great canals, their straight military roads, their aqueducts and fortresses, would be inexplicable if the State had not had the power to enforce cession in individual cases. Probably they did as the English to now—passed a special law for the particular case. An Act of Parliament is necessary in England if owners are to be forced to resign their properties for public undertakings[13]. Expropriation.

[8] *Prussian Law*, ii. 16. § 1 ff.

[9] Blackstone, i. 8, quotes Bracton: 'Haec quae nullius in bonis sunt et olim fuerunt inventoris de iure naturali, iam efficiuntur principis de iure gentium.'

[10] Blackstone, ii. 16, 26.

[11] *Code Civ.* Art. 713. Cf. Arts. 539, 723, 768.

[12] *Austrian Code*, § 381 ff.

[13] Cf. Blackstone i. 1, and many recent laws on canals and railways.

Compensation.

On the continent the right of expropriation has been generally adopted and regulated. Many modern constitutions include the principle that the State has a right to enforce cession of property for purposes of public welfare if it pays full compensation [14].

This principle is completely justified by the consideration that where the private rights of individuals and the general rights of the public conflict with one another, the latter ought to prevail, but only so far as circumstances demand. The opposing interests are reconciled by cession on the one side and compensation on the other.

The question whether public interest demands expropriation in any particular case belongs to public law, and ought, therefore, to be settled not by a civil court, but by the organs of the government proper, either by the legislature, as in England and the United States, or by the actual executive, as is usual in Germany, or by administrative courts. The latter procedure is fairer, for it is the business of government to settle in each case what the public good demands, and it is best fitted for estimating the means proposed. But the procedure must be such that no arbitrary caprice be allowed to encroach on private rights [15].

For examples see *Neuester Expropriationscodex*, Nürnberg, 1837, and especially Grüntrab, *Enteignungsrecht*, p. 66, foll.

[14] *Bavarian Law of* 1756, iv. 3. § 2.

Prussian Law, i. 11. §§ 4–11. Introd. §§ 73–75. *Code Civil*, Art. 545: 'Nul ne peut être contraint de céder sa propriété, si ce n'est pour cause d'utilité publique, et moyennant une juste et préalable indemnité.'

Austrian Code, § 365: 'If the general good demands it, a member of the State must give up his property in return for due compensation.'

French Constitution of 1848, Art. 11, and to the same effect the Charter of 1814, Art. 9, and the Code. Belgian Const. of 1831, Art. 11. Austrian Law of 1 Dec. 1867, Art. 5.

Pruss. Const. of 1850, Art. 9: 'Property is inviolable: it cannot be taken away or limited except on grounds of public welfare after previous payment, or at any rate arrangement of compensation according to law.'

[15] *Bavarian Law of* 1837. Cf. Treichler, *über die Zwangsabtretung*, in the *Zeitschrift für deutsches Recht*, Beseler, Reyscher und Wilda, Bd. xii. H. 1. For more recent works see Grüntrab, *Enteignungsrecht*, 1874, and for a full list of references see Meier und von Holzendorff's *Rechtslexikon*, i. 764 ff.; *French Law of* 1841, Art. 51: *Zürich Law of*

The right to enforce cession belongs only to the State, or, in the narrow circle, to the Commune; never to private persons. But the State may empower individuals or societies to demand cession for special undertakings: railway companies in England and America frequently receive these powers.

Many legislatures restrict the right to the case of real property and specially-named objects. But the same principle applies equally to personal property and to any public purposes which may be suggested by new discoveries or advance in civilisation.

Assessment of compensation.

On the other hand, the assessment of compensation is entirely a question of private law, and must be decided either by agreement or by the civil courts. The State is of course bound to give full compensation, that is to say, not merely the ordinary price, but an augmented price sufficient to repay the proprietor for his indirect, as well as his direct interest, but not a merely fancy price.

Some laws allow the indirect advantage which the proprietor gains by the change to be set against the indirect damage[16]: others, again, refuse to take this into account. The first system, as limited by the Zürich law, is fairer, because it corresponds more nearly with the real relations of value and damage.

[*Note.*—On the whole subject, see Mill, *Political Economy*, Book II. Chs. i, ii; Laveleye, *Le Socialisme Contemporain*; Rae, *Contemporary Socialism.*]

1838, § 7. In calculating the indirect damage to the property left in the hands of the owner, any advantage which he gains ought to be fairly set against it; e.g. a road is carried through a garden, the side of the garden which is left loses value as a garden, but gains more as building land. It would be unjust for the State to compensate the first loss.

[16] *Bavarian Law*, v. 1837, 6.

BOOK IV.

THE RISE AND FALL OF THE STATE.

CHAPTER I.

INTRODUCTION.

THE question about the rise of the State may be considered from two different points of view. Our intention may be either to examine the conditions and circumstances from which actual States have arisen; or to discover the necessary cause which lies at the basis of all States—the basis of the State in law and justice (*Rechtsgrund*). The first question is one for history to answer, the other for speculation. History distinguishes the different forms in which the State arises according to the manifold events which it considers. Speculation, starting with the unity of the conception of the State, requires also a unity of origin.

Two questions about the rise of the State: one historical, the other speculative.

Let us refer first to history and not enter upon philosophical consideration until we know the experience of nations.

The rise of the first states took place farther back than our knowledge of history extends. There was no consciousness of history until there were already many states upon earth. Even the ancient sacred books of the Jews, which inform us of the first rise of the Jewish state, presuppose the Egyptian state, without telling us anything of its origin. Perhaps the Indian state served as a model for the Egyptian; but the sacred writings of the Indians give us no light on the subject.

History since then has seen the beginning and the end of very many states, and thus tells us much more of their rise and fall than mere speculation. All the ancient European states have perished centuries ago, and almost all the Asiatic. Most of the states which exist at present had

their birth within a period known to history. Many of them are still quite young. The circumstances and the influences which have brought them into being are not concealed from our view, although, as in all spiritual and physical creation, the creative power itself remains hid as if by a divine mystery.

The manner of the rise of a State is however not merely a phenomenon of great psychological and historical interest: it exercises a continued influence on the whole life of the State, and determines likewise in great measure its relation to other States[1].

Thus it is even more important for the study of public law to consider the different origins of States, than it is for private law to examine the diverse forms of acquisition of property; yet the moderns have almost completely neglected the former enquiry while carefully considering the latter.

Three historical forms of the rise of States.

We may distinguish three different groups:—

1. The *original* formation of the State, when it takes its beginning among the people and in the country without being derived from already existing States.

2. The *secondary* forms, when the State is produced from within, out of the people, but yet in dependence upon already existing States, which either unite themselves into one, or divide themselves into several.

3. The *derived* formation of the State, which receives its impulse and direction not from within but from without.

The formation of a new State, of which alone we are here speaking, must not be confounded with mere changes in constitution—a distinction to which Bodin[2] rightly called

[1] De Tocqueville, *Democracy in America* (Transl. by Reeve), Part i. ch. 2: 'All nations bear some marks of their origin: and the circumstances, which accompanied their birth and contributed to their rise, affect the whole term of their being.'

[2] Bodin, *de Rep.* iv. c. 1, calls the latter 'conversiones': 'Conversionem civitatis appello, cum status ipsius convertitur ac omnino mutatur; id autem fit, cum imperium populare ad unum, aut paucorum potestas ad omnes cives defertur, contraque.' [Contrast the view of Aristotle, who makes the identity of a State depend upon identity of constitution. *Pol.* iii. c. 3.]

attention. The change of the old Roman Monarchy into a Republic brought no new State into existence, nor again did the overthrow of the Republic and the introduction of the Empire. These changes in the form of government mark different periods of life in the same State, they are not the beginning of different States.

CHAPTER II.

HISTORICAL FORMATIONS.

I. ORIGINAL.

1. Creation of an absolutely new State.

THE most original of all the many ways in which a State can arise is represented in the legend of the foundation of Rome. Here everything is new: the people gathers itself round common leaders out of fragments of many different races, and becomes a united Roman people: uncultivated and unclaimed territory is taken possession of, and becomes the site of the eternal city. In this legend we find the idea of a completely new creation. The organisation of a multitude into a nation does not precede their establishment in a territory: they are connected with the city from the first. Both elements coincide, and the foundation of the State is straightway consecrated by prayers for the blessing of the gods, and legally established by the statutes given by the new king to the people, and approved by them. The creative spirit of the king and the political will of the people meet together in the law of the State, as in a single act[1], and the State is the free work of the conscious national will.

We may well doubt whether this form of a political 'creative act' ever really took place. But it corresponds

[1] Leo, *Weltgeschichte*, i. 393, says that 'contract' is the characteristic element in the foundation of Rome, and in fact the ancient form of Roman legislation recalls the customary form of obligatory contract, the *stipulatio*. Nevertheless, Roman law in its essence is no contract, between two independent persons, but a single act of the Roman people as a unit.

most completely to the idea of the State which comes into life fully formed like Athene from the head of Zeus.

2. Political organisation of the inhabitants of a definite territory.

Secondly, the territory and people may be already there, but the people may not yet have attained to the consciousness of political coherence. Here that which creates the State is the organisation of the people. We find a celebrated model for this also in ancient legend. The Athenians are the children of Attica (*αὐτόχθονες*), which they inhabited centuries before the Athenian State was founded. Its origin is traced to Cecrops, who first taught reverence for the gods among the rude inhabitants, instituted the family, introduced agriculture and the planting of the olive, arranged the people in tribes or castes, and established government and justice. According to another story, all this is ascribed to king Theseus, who united the scattered communities of the country in a single State and concentrated the government in Athens[2]. According to either version it is the organisation of the people to whom the land belonged which brought the State into being.

The foundation of the Republic of Iceland is a well-known historical example of this formation of the State by an organisation of a people in a definite country[3]. At first there were only isolated settlements of numerous chiefs (*Goden*), seignories of independent *Godorde* and *Dingstätten*. But on the proposition of Ulfljot, with the assent of the Godes, a common *Allding* was formed for the whole population of the island, and for legislation and administration of justice a common organ was provided, to which all

[2] The Athenians called this bringing together of the various cantons into one state *ξυνοικία*. Cp. the learned treatise of W. Vischer, *Ueber die Bildung von Staaten und Bünden im alten Griechenland*, Basel, 1849. [τὰ *ξυνοίκια* is the name of the festival in memory of Theseus' uniting all the towns of Attica under the single government of the capital, Thuc. ii. 15. The union itself is called *ξυνοίκισις*, Thuc. iii. 3. In Attica separate *πόλεις* were formed into one *πόλις*. This was a more advanced form of union than the formation of a city, such as Megalopolis, out of villages. Cp. Freeman, *Federal Government*, p. 28; *Comparative Politics*, p. 382.]

[3] Cp. Maurer, *Beiträge zur Rechtsgesch. des germ. Norden*, 1852, Heft i.

Godorde were subject. Thus the population of the island became a nation.

The foundation of the State of California, which has taken place before the eyes of our contemporaries, is an example of a new people voluntarily constituting itself in a territory belonging to the United States of North America. The thirst for gold had brought together from the whole world an incoherent mass of all sorts of individuals: on the 1st September, 1849, they elected representatives to a constituent assembly, and on the 13th October the projected constitution of the new State was laid before the people for their approval. All history hardly presents us with an example which could serve better than this to prove the possibility of forming a State by the free adherence of individuals; and yet, if we consider this case more closely, it is clear that the decision did not depend upon a contract of all individuals[4], but upon the will of the majority, and that the unity of the community was necessarily presupposed. The constitution was created not by the wills of individuals, but by the common will of the whole population.

The formations which are produced at the present day within the United States of America have always this character. First, a 'Territory' is measured off and opened up to colonists. This is at first treated as a province of the union, and the federal government provides for its administration; when the population has increased they receive a new constitution, and the Territory is recognised by Congress as a new State.

3. Occupation of territory by an already existing nation. Conquest.

It more often happens that a nation is first formed, and that they afterwards take possession of the land as the second indispensable element for the existence of a State. This may be called occupation of territory.

It very frequently takes the form of conquest of an in-

[4] R. v. Mohl works out this example in more detail, and uses it as a confirmation of the theory of Social Contract (*Zeitschrift* v. Mittermaier *für ausländ. Rechtswiss.* xxvii. 5, 394).

habited country. This was the case with the old Jewish State, with the Dorian Greeks, and with the Teutonic races in the Roman provinces and in Slavonic countries. Here the military supremacy of the people is asserted over the inhabitants of the conquered territory. War is indeed a destructive agency, but has also a direct influence in the creation of States. It furthers the political qualities of subordination and manly authority, and a victorious people are especially capable of forming a new State in a conquered country.

States which have arisen in this way have at the beginning of their existence to overcome great internal as well as external difficulties. Even if the contest of arms is not renewed, there commonly begins a struggle of civilisations between conquerors and conquered, and this continues until the political unity of the mixed people is complete. In order to guard his newly-organised nation against this danger, Moses commanded the Jews to exterminate with fire and sword the inhabitants of the Holy Land which Jehovah had given them. Many victorious peoples have succumbed to this danger, having been again subdued by the higher civilisation of the conquered race.

Conquest, although in the form of force, has always among all nations been looked upon as a source of political right. The saying of Alexander the Great[5], that the conqueror gives the law and the conquered receives it, is still true to-day.

Might and right.

Certainly the system of rights (*Rechtszustand*) is still in an immature condition where external force exercises so supreme an influence on the production of new and the destruction of ancient rights; but rude as is the form of conquest, it yet contains a moral significance which explains its importance in the formation of law. Ancient peoples,

[5] Q. Curtius Rufus, *Vita Alexandri*, iv. 5. Cp. Grotius, *De jure belli ac pacis*, iii. c. 8. § 1, where the saying of the German king Ariovistus to Cæsar is quoted: 'Jus esse belli, ut qui vicissent, iis quos vicissent, quemadmodum vellent, imperarent.' (Cæsar, *De Bello Gallico*, i. 36.)

and especially the Teutonic, regarded war as a great international law-suit, and victory as the judgment of God in favour of the victor[6]. Thus conquest appeared not as mere physical superiority, but as a confirmation of the moral power which justifies political authority. This is not out of harmony with the modern view of the State which seeks to comprehend it as a human institution. Not every victory indeed is recognised as a proof of right, nor every defeat as a sign of wrong. Superiority in the weapons of war cannot any longer be regarded as a ground of right. But the result of the great historical development which from time to time brings to rest the strife of contending peoples, is regarded as a decision of nature and time in the great national and political process, and since moral elements are at work in it, it has the significance of a world-historical judgment. 'History judges the world[a].' The subsequent recognition of the new situation as a necessity, whether by a treaty of peace or by voluntary submission of the inhabitants, makes good the legal defects of the original occupation[7].

Peaceful settlement.

Another and more peaceful form of territorial acquisition is the settlement of political communities in an uninhabited or scarcely cultivated country, with the intention of founding a new State there. This is the character of many European colonies in other parts of the world. If the colonisation is directed by the mother State, then we have an example of the derivative form of origin (chap. iv. 1). But if the colonists, already constituting an organised society, like the 'Pilgrim Fathers' in New England, by their own efforts and at their own risk form a new com-

[6] Bluntschli, *Studien*, p. 202: 'War is the rude form of maintaining International Law which has hitherto prevailed. But there is a growing consciousness that it is only the prelude to a procedure more just and more worthy of humanity.'

[a] ['Die Weltgeschichte ist das Weltgericht;' said first by Schiller in a poem called *Resignation*. Cp. Hegel, *Phil. d. Rechts*, § 340.]

[7] Bluntschli, *Mod. Völkerr.* § 701: 'Conquest does not establish a new and peaceful legal condition until after submission or a treaty of peace.'

munity on soil which has hitherto belonged to no State, this is the formation of an essentially original State. If the barbaric natives remain in the territory of the new colony, the difficulty of arranging the relations of the two populations is almost as great as in a conquered country. But the superiority of a civilised over a barbarous people necessarily leads to the dominion of the former.

CHAPTER III.

II. Secondary Formations.

A. Formation of a Composite State by a league between States.

Two or more States feeling too weak in isolation, or desiring to attain a national unity, may join together in a new and larger Federal State (*Bund*). This is not founded by the contract of individuals, but it is either founded or at least prepared for by a contract between States. But a new collective State does not come into existence until a federal constitution has been made.

Examples of this new form of State are the old Greek confederation of Bœotia, the unsuccessful attempt of Epaminondas to unite the Arcadians, the Peloponnesian alliance under the leadership of Sparta, the Ætolian and Achæan leagues; the Samnite league in Italy; and in the later middle ages the leagues of the German Hanse-towns, of the Swiss confederates, and of the United Provinces (Holland).

The State so produced is not simple but complex, since the various States which form it still remain, and are only united in a new association. Since this association depends at first upon State contract rather than upon State law, succeeding generations inherit the contradiction of several States essentially independent, and yet in other respects not less essentially dependent on the complex State. There results from this a perpetual action and reaction, and frequently a conflict between the particular and the general spirit.

If the feeling of unity becomes stronger, and the common organisation more developed, then the form of State contract gives place to that of constitutional law. On this distinction are based the two chief forms of union between States:

Confederation (*Statenbund*) and Federation (*Bundesstat*)*. Both are composite political bodies, and in so far different from mere alliances which form no new State; but the first retains the character of a contractual combination of States, the second implies the advance to the formation of a collective State or union.

1. Confederation.

A Confederation, by joining several States in a political association, presents at least externally the appearance of one State, of an international personality, but yet is not organised into one central State, distinct from the particular States: the management of the collective State is left either to some particular State as president (*ἡγεμών*, *Vorort*), or to an assembly of delegates and representatives of all the several States. The former was the case with the Greek leagues under the Hegemony of Sparta and Athens, the latter with the Swiss Confederation up to 1848, and with the German Confederation of 1815.

2. Federation.

In a Federation, on the other hand, there are not merely completely organised particular States, but there is an independently organised common or central State. The power of the Federation is not left to one of the particular States nor entrusted to the assembly of them. It has produced its own Federal or National organs which belong only to the collective body. The Achæan league with its common assembly of the people as a legislative body, with its Federal general as chief of the league, with its Federal council and tribunal, was already in some measure such a Federal State. This form of State first appears in modern times in the United States of North America, but not until the act of union of 1787. It was afterwards imitated by Switzerland in the Federal constitution of 1848. Both constitutions depend no longer on a contract between States, but imply the existence of a common nation and a common State, whose one will makes the constitution and demands obedience from the minority, even of particular States. Thus the

* [Cp. Freeman, *Federal Government*, i. c. ii. pp. 9–15; *Comparative Politics*, p. 387.]

preliminary stage of Confederation is passed over, and the higher stage of Federation or Union is reached [1].

Both forms of composite State are better adapted for Republics than for Monarchies. This may be clearly seen if we compare the history of the North American and of the Swiss constitutions with the struggles about the reform of the German Confederation.

3. A Federal Empire has been formed out of the North German Confederation.

The constitution of the North German Confederation of 1867, and that of the German Empire of 1871, do indeed, both in fact and in law, unite the different political powers and forces of Germany in common national action; but if we consider principles, this constitution is like a butterfly, not yet quite emerged from the chrysalis. The form of its origin points on the one side to a free contract of all the particular states (princes and chambers); but the constitution, as a matter of fact, came into existence by the guiding will of the Prussian government in connexion with the labours of the imperial Diet (*Reichstag*) as the representative of the German nation. Contract and law are here united in a remarkable way, but the representation of the united governments in the Federal Council (*Bundesrath*) still recalls the earlier Confederate German Diet (*Bundestag*). The original designation of *Bundespräsidium* (Federal Presidency), which was ascribed to the royal crown of Prussia, had likewise the same Confederate character. But if we consider the actual powers of the President, and his constitutional authority, especially as Generalissimo, there stands clearly before us the chief of the German Empire. And the constitution of the Empire has now recognised this by the majestic name of German Emperor. The institution of the Imperial Diet, has in conception, as well as in fact, more unity than even the North American Congress or the Swiss Federal Assembly.

[1] Cp. on this point the '*Federalist*' by Hamilton and Madison; Story's *Commentaries on the Constitution of the United States*; Bluntschli, *Geschichte d. Schweiz. Bundesrecht*, i. p. 352; Waitz, *Politik*, 1862.

The constitution of the German Empire differs from Republican Federations, mainly in the following respects:— Differences between the German Empire and Republican Federations.

(*a*) Many directing organs of the whole State are necessarily, or in fact, united with the authorities of the particular States which compose it: thus the German Emperor is the King of Prussia, the members of the Federal Council are identical with the rulers of the particular States, the Imperial Chancellor and a great part of the higher officials of the Empire are Prussian ministers. In Federal States, on the other hand, the two organisms are completely separated.

(*b*) In Federations the different States are indeed unlike in power and size, but are together weak in comparison with the union, and so far like one another, but in the German Empire the kingdom of Prussia is much more powerful than all the other States taken together, and therefore must be considered as the chief and presiding authority upon which the power of the Empire mainly depends, without which it is nothing, and round which the remaining German States are grouped.

(*c*) The constitution of the Empire, and of most of the particular States, is monarchical.

These differences are so great that it is better not to include the new German constitution under the already existing notion of a Federal State, but to give it the name 'Federal Empire,' and to regard it as a new and parallel form.

Allied to the form we have been discussing is the Union (in a special sense) of two or more States, either under one common ruler, or as a single new State. Of this there are various kinds and degrees. The union is always imperfect when it is merely personal. This may be merely transitory if the same person happens to succeed to the thrones of two different States, and may afterwards cease if the succession falls again to two different persons. Of this sort was the union of the German Empire and Spain under Charles V, of Poland and Saxony under Augustus II and III, of England and Hanover under the male rulers of the

B. Union.

4. Personal Union.

Brunswick line, of Schleswig-Holstein and Denmark according to the treaty of 1620. This form of union is the lowest of all. It does not produce a new united State, but only brings two independent States into a mere external relation under the authority of the same prince.

This Personal Union is permanent when the crown of two States belongs to the same dynasty and devolves according to the same laws of succession. We have examples in the 'Pragmatic Sanction' of 1713 for the States united under the Austrian sceptre, which was accepted in 1722 by the Hungarian diet for the kingdom of Hungary; in the acquisition of the principality of Neuchâtel by the King of Prussia in 1707; in the union of Norway and Sweden since 1814; in the agreement between the kingdom of Hungary and Austria since 1867.

This permanent dynastic union may indeed found a new composite State, but the unity is very imperfect, and usually has no practical importance unless absolute power is really concentrated in the person of the ruler. In all other cases there is in reality something contradictory and discordant in the situation—on the one hand, two States with conflicting interests and opinions; on the other, a common prince who may even, as sovereign of the one State, be obliged to declare war against the other. This form of personal union cannot therefore well be combined with representative government.

5. Real Union.

A higher unity is to be found in the so-called Real Union, which is related to Federation, as Personal Union is to Confederation. In this not merely is the person of the ruler the same, but the supreme government even in legislation and administration[1]. The united States may indeed have a relative independence, within certain limits they may

[1] Pözl (*Deutsches Statswörterbuch*, Art. *Union*) makes a different distinction between Personal and Real Union. The former, according to him, is the accidental, the latter is the constitutional (*grundgesetzliche*) coincidence of sovereignty over two or more States in one person. The connexion between Sweden and Norway would thus be a Real Union.

have special legislatures and executives, but the whole State is one organism, and its highest interests are concentrated in the same hands. Examples are the union of Norway with the kingdom of Denmark by the imperial law of 1536; the union of Castile and Aragon, if not at first (1479), yet afterwards under Hapsburg princes; above all, the Austrian monarchy according to the fundamental law of 1849 and the constitution of February 1861.

The constitution of Austro-Hungary since 1867 approaches the forms of Personal Union in the dualism of the two chief States, but there are elements of Real Union in the institutions of a common ministry for foreign affairs, of the imperial army and finances, as well as in the common delegation of the two representative bodies of Austria and Hungary. Each of these chief States themselves began as personal unions, but have now become real unions.

6. Complete Union.

Complete Union puts an end to the separateness of the united States, and forms not a composite but a single State.

England and Scotland were originally bound together by a mere personal union, but their Union into Great Britain in 1707, and the later Union between Great Britain and Ireland in 1800, make them examples of a Complete Union. Their separate Parliaments came to an end, and there is one Parliament for the whole realm. More recent examples are to be found in the incorporation of the principalities of Hohenzollern with Prussia in 1849; the annexation of the Italian duchies and of the kingdom of Naples to Piedmont in order to form the new kingdom of Italy in 1860–1861; above all, the transformation into Prussian provinces of the kingdom of Hanover, the principalities of electoral Hesse, Nassau, Schleswig and Holstein, and of the free city of Frankfurt.

Public law was formerly inclined to regard these unions and changes exclusively from a dynastic point of view, as if the matter in hand were only the acquisition or inheritance of several pieces of ground by the same private person. The forms which private law provides for alienation among

living persons as well as at death (testament, inheritance) were recognised, as if a nation and a country were a bequest with which an individual man could deal as he chose. Modern public law rejects this view, which conflicts with our conception of the State, and insists that such changes, as they essentially concern the public constitution of the nation, must not be arranged without the assent of the people's representatives.

C. Division. The opposite of union is the division or separation of a greater State into two or more new States.

7. National Division. National division is apt to occur especially where different peoples, separated by their very territories, have been externally united in one State without becoming really one. If the power of concentration which has hitherto held them together is diminished, the natural differences come into play, and the process of separation begins, splitting up the existing whole into a number of new and independent States. Thus the great world-monarchy, which had been for a moment welded together by the genius of Alexander, went to pieces immediately after his death. The Frankish monarchy of the ninth century broke up according to nationalities; but this result was partly due to dynastic differences. The fall of the Napoleonic Empire, with its creations of dependent kingdoms, may be explained to a great extent in the same way: and so too the separation of Belgium from Holland in 1830.

8. Division by inheritance. During the middle ages a State was frequently divided among several sons of the deceased ruler, just as an inheritance is among several heirs. This procedure, which follows the principles of private law, is quite incompatible with the unity and welfare of a State, and has only been abolished by the recognition of the modern principle of political indivisibility.

9. Declaration of Independence. Another form appears when one part of the State declares itself independent and becomes constituted into a separate State.

As a rule the part as such is not justified in rising against

the whole and separating itself by force. History has given examples of warning in many unjustified and unfortunate attempts at separation. At the same time there are declarations of independence which have obtained full recognition, and have sufficiently justified themselves. We may recall the separation of the United Provinces from Spain in 1579, the Declaration of Independence of the North American States in 1776, the liberation of Greece from Turkish dominion in our own days. The principle needs a limitation which may be put as follows: the part is, exceptionally, justified in seceding, if its lasting and important interests are not protected or satisfied by the whole to which it belongs, and if at the same time it is capable of taking care of itself and maintaining its independent position. Only real necessity and intolerable suffering give sufficient ground for the secession, and only the moral force which proves itself victorious, and overcomes all difficulties, gives a claim to recognition. Under these two presuppositions, this recognition will be accorded by the judgment of history[3].

[3] The American Declaration of Independence treats the principle more lightly, and acknowledges the then prevailing theory of natural rights:—

'We hold these truths to be self-evident;—that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it and to institute a new government, laying its foundation on such principles, and organising its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence indeed will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evince a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government and to provide new guards for their future security.'

[Cp. the ideas and phraseology of this Declaration with Locke's *Treatise of Civil Government*, ii. §§ 222, 225.]

CHAPTER IV.

III. Derived Formations.

1. Colonisation.

(*a*) Greek.

THE colonisation of the Greeks, which covered the coasts of the Mediterranean in Asia Minor, Italy, Sicily and the Islands of the Archipelago with new cities and States, was a conscious formation of new States. The colony proceeded from the mother city like the son who goes out from the family of his father to set up a household of his own. It became immediately a new State independent of the mother city, but bound to it by the ties of descent, manners, law, religion. The young city took the holy fire from the Prytaneum of the mother city, and the ancestral gods were transferred to the new dwelling-place [1]. The Greeks founded no great Empire, but their scattered colonies Hellenised the East [2].

(*b*) Roman.

It was otherwise with the colonies of Rome [a]. They were intended to secure and extend Roman dominion, and they remained therefore in a relation of strict dependence on the capital. They were not the foundation of new States, but only an extension of the existing one State.

(*c*) Modern.

Different again is modern colonisation. If we consider the origin of modern colonies founded by European States, especially those in America, there is, as a rule, no direct foundation of new States: the intention is rather to extend

[1] Cp. Hermann, *Griechische Staatsalterthümer*, Part iv. The Phoenician colonisation was not at first the foundation of new States, but usually came to be so.

[2] Cp. Laurent, *Histoire du droit des gens*, ii. p. 310.

[a] [Cp. Marquardt, *Röm. Statsverwaltung*, vol. i. p. 35 foll.]

the dominion and civilisation of the old country or to obtain a new economic existence, or, sometimes, to escape persecution at home. In South America the dependence of the colonies on the Romance States of Europe was greater than in the North, where the Teutonic feeling of freedom and tendency to form corporations caused or at least favoured a considerable degree of colonial independence.

But if one looks to the later development and history of these colonies, they have mostly attained to an independent existence, and have thus separated themselves from European rule and become independent States. This sort of colonisation may be rather compared with the birth of a child, who increases the family as a dependent member, but after he has grown up in body and mind goes off and founds a new family.

2. Concession of sovereign rights.

Another derived formation of the State often took place in the middle ages in the form of a concession of sovereign rights to particular parts of the State. A whole series, especially of German districts, principalities, dominions, imperial cities, became independent States by obtaining particular sovereign rights from the king, and gradually increasing these until at last the king retained only an appearance of supremacy without any real power. Thus what had previously been parts of one State, became in the course of centuries independent States. The outward form of such concession was frequently that of private acquisition by purchase or loan, and is thus not adapted for the modern state. Even in the middle ages, however, that was not essential, and thus at the present day it is practically possible that a State with clear consciousness should train up a part of its dominions and confer on it sovereign rights. England proceeds in this manner towards Canada and other of her dependencies.

3. Institution by a foreign ruler.

Finally, there is the institution of a new State by a foreign ruler, especially by a conqueror whose fiat destroys old States and calls forth new ones. Europe saw, in the years of the Napoleonic rule, a number of States destroyed and others

set up by the will of the Emperor. But these arbitrary creations of momentary power attained to no real living force, and had scarcely been called into being when they died off or were destroyed—an eloquent proof that of all forms of State formation, this is the most imperfect and the least secure.

CHAPTER V.

FALL OF STATES.

The common cause of the mortality of the State to be found in its organic nature.

ALL the past history of the world testifies against the immortality of the State, and the earth is covered with the ruins of the fallen. The occasions and the forms of this fall are different, as are the causes of death in the individual. But from the fact that all States perish, we may perhaps infer a common cause of their mortality. This cause cannot be found in national demoralisation; for demoralisation is not necessary, and not always present, and on the other hand history teaches us that even demoralised peoples may live a long time, just as immoral men may sometimes attain a great age. Nor again in bad government: many a State has outlived several generations of bad rulers. Nor again, as has recently been maintained by Gobineau, in the mixture and degeneracy of race. Many States have become great and powerful by this mixture of blood, and have continued to flourish, although the national race has been essentially altered, e. g. Rome, England, the United States of North America. The true cause is to be found in the great law of all organic life, that it is developed by history and consumed by it. The life of a nation unfolds itself, and in gradually revealing what is in it fulfils its destiny and dies, overtaken and left behind by the unwearied advance of time with which it cannot keep pace.

Progressive humanity finds no complete satisfaction in any particular State, and swallows them all up. If there

ever comes into being a world-empire on the broad basis of the whole human race, then may we hope that this State will endure as long as mankind itself.

Special forms of the fall of States:

The special forms of the fall of States correspond in great measure to the modes of formation, and not infrequently old States are destroyed when new are founded. The death of one State is often immediately followed by the birth of the other.

1. National disorganisation: Anarchy.

The opposite of the organisation of the nation is its disorganisation or dissolution. A particular form of dissolution is anarchy. If authority is no longer regarded, if every one does that which is right in his own eyes, and no one cares any more for the community, nor sacrifices anything to it, then the organised nation sinks to a chaotic mass. Anarchy destroys the very principle, and not merely the existing form, of the State; but complete and lasting anarchy is very seldom to be found in the history of the world: more frequently anarchical conditions are only passing and transitory crises which threaten the life of the State, but often only prepare a new arrangement of the constitution. It is just in these times of violent convulsions that the political character of the Aryan race shows itself in a remarkable way. Even at the very moment in which they overthrow the political order with the rage of hatred, they yet submit themselves to the necessary forms of political existence, and whilst in confusion of ideas they are enthusiastic for anarchy, they obey blindly those leaders who are wildest and strictest. Behind the triumph of the disenthralled masses, intoxicated with freedom, appear the cold iron features of the dictator, and on the ruins of the old constitution the people creates for itself a new, perhaps a worse, political habitation. Even the nations of the great Aryan families are not immortal, but, so long as their life lasts, they cannot dispense with the political form of their existence any more than the fish can do without water, or the bird without air. There is no single example in history of an Aryan people permanently separating itself from the bonds of the State, or even

sinking back into the condition of Nomads. In the sixteenth century the Anabaptists completely rejected the idea of the State, like the Communists of the present day. But when they had the opportunity of making an attempt to introduce their non-political community, they set up a caricature of the State.

2. Migration.

The State perishes by the migration of a people from the land of their fathers, such as that which the Helvetii attempted in Cæsar's time, or by the expulsion of a people from their home, as frequently happened in the barbarian migrations at the fall of the Roman Empire; and it is generally uncertain whether the migrating people are to succeed in obtaining a firm rule over another country, and thus founding a new State.

3. Conquest.

The conquest of a country, and the subjection of a hitherto independent people by a foreign power, is more often the destruction of an old than the creation of a new State: the consequence is generally only the further extension of the victorious State. In this way Rome swallowed up many States and extended her dominion over their territory and population. The submission (*deditio*) of the weaker people is indeed voluntary in appearance, but as a rule it is the work of necessity and compulsion, and is thus only a form of subjection.

4. Voluntary absorption.

Complete union brings with it the extinction of the particular States, but, as it creates at the same time a new larger State out of the same nation, it may be regarded as a voluntary renunciation on the part of the particular States of their previous separate existence.

5. Voluntary separation. Compulsory partition.

The opposite of the absorption of smaller States in a larger common State is the division of an empire into several States, or the partition of one State among several foreign States. The former may occur organically without external compulsion by the different parts affirming their particularism more and more and then separating; but the latter is commonly the work of foreign force. The partitions of Poland (1772, 1793, 1795) are terrible examples of such

unjust force, in an age which prided itself on its enlightenment and humanity.

6. Withdrawal or renunciation of sovereign rights.

As the concession of sovereign rights forms new States, so by the withdrawal or renunciation of sovereign rights, previously independent States may gradually lose their political existence. The history of the German Empire offers examples of this mode of formation, the history of France of this mode of extinction. The centralisation of France, especially since Louis XI, has thus by degrees abolished a number of 'sovereign seigniories'; but Germany too, since the Revolution, has shown a similar tendency in its *mediatisations*.

CHAPTER VI.

SPECULATIVE THEORIES.

I. 'THE STATE OF NATURE.'

PHILOSOPHICAL speculation is fond of imagining a primitive condition in which men lived without government, and then asking how from that condition mankind has arrived at the State. The popular imagination has often decked out this primitive condition with smiling pictures of innocence and abundance of natural enjoyments, and dreamed of a golden age of Paradise, in which there were as yet no evils and no injustice, while all enjoyed themselves in the unlimited freedom and happiness of their peaceful existence. In this primeval condition there was supposed to be no property, since the superabundance of nature gave to every one in sufficiency all that his unsophisticated and uncorrupted tastes could require. As yet there was no difference of ranks, nor even of callings. Every one was like another. Then too there was neither ruler nor subject, nor magistrate, nor judge, nor army, nor taxes[1]. 1. The Golden Age.

In comparison with such an ideal the later political condition of man must appear perversion and decline. Only when men encountered previously unknown plagues, when The State as a necessary evil.

[1] Shakespeare depicts this 'state of nature' with brilliant irony in the *Tempest*, Act ii. Scene 1, line 140 ff.

passions were aroused in their breasts, and new dangers appeared, and guilt destroyed the peace of their souls, was there needed a power to terrify and to punish the wicked, and to secure the enjoyments of all against disturbance. Thus the State was thought of as a necessary evil, or at least as an institution of compulsion and constraint to avoid greater evils.

2. The state of Nature as a state of war.

In opposition to this childish and cheerful idea of Paradise, other and sometimes morose philosophers imagined the non-political condition of man as much worse than the political, as a condition of ceaseless hate and war of all against all: and if even they thought the State an evil, yet this evil was more endurable and less than the original 'state of nature' in which men were like wild beasts[a]. This philosophical idea found a welcome confirmation in the theological speculation which regarded the State not as the organisation of Paradise, but of fallen humanity.

Both views overlook man's political nature.

Both these views overlook the political nature of man, both ignore the truth[2] which Aristotle expressed so well, that man is 'a political animal.' We may imagine a condi-

[a] [According to Hobbes, *Leviathan*, Part i. chs. xiii, xiv, the *natural* condition of man, i.e. his condition 'out of civil states,' is 'a condition of war of every one against every one.' Cp. Spinoza, *Tract. Pol.* c. ii. § 14: 'Homines ex natura hostes.' c. v. § 2: 'Homines civiles non nascuntur sed fiunt.' But these expressions of Hobbes and Spinoza are to be understood rather as a logical statement of what *would be* the condition of man apart from civil society, than as distinctly implying a historical theory. They err from ignoring history rather than from asserting false history. The word 'natural' is used merely in the negative sense of 'non-civil' or 'non-political,' and thus is the very reverse of Aristotle's φύσις, which, as he tells us, is to be found in the end (τέλος) or completest development of anything. *Pol.* i. 2, § 8, 1252 b. 32. In § 16, 1253 a. 31 he says almost the same thing as Spinoza, *op. cit.* c. ii. § 14.]

[2] Rousseau (*Disc. sur l'inégalité des conditions parmi les hommes*): 'L'homme, dans l'état de nature, répugne à la société.' Mirabeau answered him excellently: 'Non seulement l'homme semble fait pour la société, mais on peut dire qu'il n'est vraiment homme, c'est-à-dire un être réfléchissant et capable de vertu, que lorsqu'elle commence à s'organiser Les hommes n'ont rien voulu ni dû sacrifier en se réunissant en société: ils ont voulu et dû *étendre leurs jouissances et l'usage de la liberté*, par les secours et la garantie réciproques.' (*Essai sur le despotisme.*)

tion of man which preceded the rise of the State, but this condition could never have satisfied his higher needs[3], and it was an immeasurable advance in his development when the germ of political capacity unfolded itself and came to light.

[3] Plato (*Rep.* ii. 369) makes the State come into being, because the individual man is not self-sufficing (*αὐταρκής*).

CHAPTER VII.

II. The State as a Divine Institution.

In antiquity as well as during the middle ages the belief in the divine institution of the State was more extended and more intense than at the present day. But even then this divine foundation of the State was understood in very different senses.

1. The State as directly founded by God.

According to one view, the State was the immediate work of God, the direct revelation upon earth of the divine government. This view lay at the basis of the Jewish theocracy, and its logical consequence is always the theocratical form of the State to which alone it is adapted. If God has founded the State directly, it is natural that He should maintain and govern it directly.

2. As indirectly founded by God.

According to another view, the State is only indirectly founded by God, and is only indirectly governed by God[1]. This view was shared by the Greeks and Romans. Their States were by no means theocratic but thoroughly human, yet no public business of any importance was undertaken in antiquity without prayer and sacrifice preceding, and the care of the auspices, by which the will of the gods was discovered, occupied a great place in the public law of the Romans. They united a consciousness of human freedom

[1] It is only in this sense that Niebuhr (*Gesch. d. Zeit der Revol.* i. 214) calls the State 'an institution ordained by God, and belonging to the essential nature of mankind, like marriage and the paternal relation. But it is an institution which cannot become perfect in this world. The State, as it actually exists, is only a shadow of the divine idea of the State.'

and self-determination with the belief in a divine direction of human affairs; and if even in the destiny of the individual the power of the gods was felt, it appeared to them still clearer that the destiny of that great moral community, which we call the State, could not be separated from the will and working of deity[2]. Were they mistaken?

It is self-evident that Christianity cannot regard the State as outside the divine ordering and government of the world. It is significant for the Christian conception that the apostle Paul, at a time when the Emperor Nero was persecuting the Christians, addressed these famous words to the Romans (xiii. 1): 'Let every soul be in subjection to the higher powers: for there is no power but of God; and the powers that be are ordained of God.' Thus it is natural enough that during the whole middle ages, in all Christian States, the sovereign authority was derived from God, and the highest authority, that of the Emperor, immediately and directly[3].

[2] Haller (*Restaur.* i. p. 427) cites a fine passage of Plutarch, in which he says: 'A city might more easily be founded without territory, than a State without belief in God.' Cp. Washington's Inaugural Speech to Congress in 1789: 'It would be peculiarly improper to omit, in this first official act, my fervent supplication to that Almighty Being, who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a government instituted by themselves for these essential purposes, and may enable every instrument employed in its administration to execute with success the functions allotted to his charge. In tendering this homage to the great Author of every public and private good, I assure myself that it expresses your sentiments not less than my own, nor those of my fellow-citizens at large less than either. No people can be bound to acknowledge and adore the invisible hand which conducts the affairs of men more than the people of the United States. Every step, by which they have advanced to the character of an independent nation, seems to have been distinguished by some token of providential agency.' [The Speeches are given in Sparks, *Life of Washington*, vol. ii.]

[3] This is also the meaning of the *Constitutio Ludovici Bavarici* of the year 1338: 'Declaramus quod imperialis dignitas et potestas est immediate a solo Deo (i.e. not indirectly, *mediate*, through the Pope)—statim ex sola electione (by the Electors—*Kurfürsten*) est Rex verus et imperator Romanorum censendus,' The *Augsburg Confession* (1530) teaches in its 16th Art.: 'That all authority, government, law and order in the world have been created and established by God Himself.'

Erroneous views of the divine nature of the State.

Grand as is the view which connects the rise and fall of States with the divine government of the world, and high as its moral significance is always to be accounted, we must not overlook that this is essentially religious, and not political; and thus this idea, if made a political and legal principle, causes and palliates errors and abuses. Thus—

Monarchical prejudice.

1. God has indeed made man a political being, but at the same time has made him free to realise the implanted idea of the State by his own exertions and according to his own judgment, and in the forms which seem suited to him. It is a profound error to reject particular forms of the State, for instance the republican, because God rules the world as a king.

The prince as God's representative.

2. Authority is indeed in principle and in fact dependent on God, but not in the sense that God has exalted particular privileged persons above the limitations of human nature, set them nearer to Himself and made them demigods, nor in the sense that God has named human rulers as His personal representatives, identical with Himself so far as their authority extends[4]. Such theocratical ideas contradict the human nature of those to whom the government of the State is entrusted. The proud words of Louis XIV, 'We princes are the living images of Him who is all holy and all powerful[5],' are a blasphemy towards God, and an insult towards his subjects—men as much as he.

Authority as such divine.

3. Many understand the authority, distinct from the persons who exercise it, as superhuman and politico-divine. Stahl says[6], 'The authority of the State is of God, not only

[4] Cp. Stahl, *Statslehre*, ii. § 48: 'According to the theocratic conception of the middle ages, the chiefs of Christendom are the representatives of God Himself. Rulers (Pope, Emperor, and Kings) have thus in their own persons the fulness of His authority.'

[5] *Œuvres de Louis XIV*, ii. p. 317, where the following passage occurs: 'Celui qui a donné des rois au monde a voulu qu'ils fûssent honorés comme ses représentants, en se réservant, à lui seul, le droit de juger leurs actions. Celui qui est né sujet doit obéir sans murmurer: telle est sa volonté.'

[6] *Statslehre*, ii. § 43. On the other side cp. Macaulay in the passage quoted *infra*, Bk. vi. ch. xiv. *footnote* 2.

in the sense that all rights are of God, property, marriage, paternal authority, but in the quite specific sense, that it is the work of God which He regulates. The State rules, not merely in virtue of the rights which God has given it, as a father does over his children, but it rules in the name of God, therefore it is that the State is clothed with majesty.' But this is to come back to an objective theocracy, which would practically lead to the ruler being considered the personal representative of God—a view which Stahl himself rejects—and would introduce again all the assumptions and abuses bound up with it. Christ himself by his saying, 'Render unto Cæsar the things that are Cæsar's, and unto God the things that are God's,' has clearly and decidedly pointed out the human character of the State, and rejected every identification of political authority with specifically divine rule. Therefore political science does well in considering the existence and institutions of the State from the human point of view.

Divine right

4. Not infrequently the immutability of the existing constitution, and especially of the person of the ruler or of his dynasty, has been defended by the principle that the 'powers that be are ordained of God.' But that the immutability of the external forms and of personal relations is no necessary part of the divine government of the world, is shown by the whole of history; and Paul's very advice, to obey 'the powers that be,' recognises indirectly the mutability of political institutions. In the seventeenth century, indeed, that precept might cause many pious Englishmen to have sincere scruples whether it was right to resist the tyranny of James II, and to deprive him of his throne; but after William of Orange was recognised as king by the nation and the parliament, even the most scrupulous and conscientious religious Tory could honour in him 'the power ordained of God[a].'

[a] [The non-juring Tories were by no means in such a hurry to recognise William III. They maintained that the *de facto* king was not king *de jure*. Bluntschli seems to have taken his idea of the scrupulous religious Tory from the 'Vicar of Bray.']

Irresponsibility.

5. It is the same with the question of responsibility. That statesmen to whom much is entrusted, and that princes who have power conferred on them, are responsible to God for what they do or omit, follows from the previous principle; but that does not decide on the further question, whether and how far they are also responsible to a human judge. Irresponsibility to human judges is claimed for the highest authority in the State, not because it is specially divine, but simply because it is the highest.

The statesman must not, in the belief that God determines the destiny of nations and States, and in the confidence that God will govern well, tempt God and shirk his own responsibility. Rather, he is not freed from his own responsibility, until he has conscientiously fulfilled the task entrusted to him to the best of his power[7].

History of the expression 'by the grace of God.'

Note. The history of the expression 'by the grace of God,' which is added to the title of kings, deserves attention. At different periods it has had different senses.

(*a*) The expression was especially used in the middle ages. The old Frankish kings used indifferently the forms, '*gratia Dei*,' '*divina ordinante providentia*,' '*divina favente gratia*,' '*divina favente clementia*,' '*per Dei misericordiam*.' At that time the expression signified merely the humble reverence and religious gratitude of the king towards God, to whom he ascribed his personal elevation; but it was used by elected as well as hereditary princes. King Pipin, who owed his elevation to a revolution, used the formula as readily as his son Charles the Great.

In the Frankish period it expressed no sovereign power. Bishops and abbots, although legally chosen or appointed by kings, and temporal counts, although royal officials, added this formula to their titles.

(*b*) In the German-Roman Empire the expression at first continued in the same way. Not only elected kings, but dukes, counts who held offices under the king, and bishops and abbots recognised in the same way the grace of God. Sometimes temporal magnates add to the grace of God the grace of the emperor, and spiritual princes the grace of the pope '*Dei et imperiali gratia*,' '*Dei et apostolicae sedis gratia*.'

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[7] Lamartine, *Révolut. de* 1848, i p. 47, says of himself: 'Il tentait Dieu et le peuple. Lamartine se reprocha depuis sévèrement cette faute. C'est un tort grave de renvoyer à Dieu ce que Dieu a laissé à l'homme d'État, la responsabilité; il y avait là un défi à la Providence.'

Gradually, however, the exclusive use of the phrase 'Grace of God' comes to signify *immediate* or *direct* authority; as opposed to the derived authority of a vassal. The expression corresponded above all to the mediæval tendency to derive all power from God.

(*c*) After the Reformation the Lutheran theologians began to proclaim the saying of Paul, 'the powers that be, are ordained of God,' as a Christian dogma, and to declare those in authority the anointed representatives of God. Luther himself was less narrow; he once wrote to King Henry VIII of England: 'I, Martin Luther, by the grace of God ecclesiastes, to Henry, by the ungrace of God King of England.' . . . The theologians who held by the letter did not consider that the apostle Paul expressly applied that saying to the Roman Emperor Nero, who had received his power from the Roman people, and meant to oppose the theocratically minded Jewish Christians who contemned the heathen emperor. They overlooked the fact that the apostle Peter had quite the same intention, when he recommended to the Christians obedience to human government (1 Peter ii. 13). They gloried in being the defenders of the divine right of temporal princes.

(*d*) Still more decidedly Louis XIV of France and James II of England attempted to make 'the grace of God' a new political dogma, and thereby to obtain a higher sanction for the absolutism of the king. Unlike all the other human rights of property, family, parliament, the right of the king was to be specifically divine, that is to say, absolute. He was to be raised above the sphere of human law. Meantime the French estates refused to sanction the king's divinity, and the English Parliament resisted still more vigorously. The English Revolution of 1688 and the French Revolution of 1789 definitely rejected this theocratical principle.

(*e*) The most decided adversaries of this principle were the German publicists, Puffendorff and Thomasius, but above all, Frederick the Great, who saw in it the fundamental error of European politics.

(*f*) Stahl has recently attempted to give a new acceptance to the false idea, and to smuggle it anew into the theory of the State in the form of an *objective* divine right of authority, as distinct from the *personal* deification of the absolute king. In vain: the modern world cannot be bewitched by this abortive product of a diseased imagination.

CHAPTER VIII.

III. The Theory of Force.

'Might is Right.'

'The State is the work of violent domination, it is based on the right of the stronger.' Thus we are assured by certain philosophers, but still oftener by despots[1].

This doctrine is favourable to despotism, for it justifies every act of violence; but it may also serve the purpose of revolutionaries as soon as they are strong enough to exercise force openly. It is ordinarily invoked by the brutal might which violates right. It is a sophism attractive only for the strong, more likely to crush than to deceive the weak: it may deceive the man who holds it, but not others.

Is this the teaching of History?

It has been said that history proves the truth of this opinion. Certainly, force shows itself more often in the foundation of States than contract, but only very seldom has brute force alone arbitrarily produced States, and never great and lasting States. As a rule, if force, especially in the form of war, has had its share in the foundation of new States, the force was still only the servant of real claims of right. It was not the source of right, but only broke through the obstacles which prevented it flowing in its proper channels. Might did not create right, but supported it, and compelled recognition for it. Wherever in history force appears in its nakedness, there it is not an instrument of creation, but of destruction and death.

[1] Plutarch (*Life of Camillus*, c. 17) puts this theory into the mouth of the Gallic king Brennus: 'The most ancient of all laws, which extends from God to the beasts, gives to the stronger rule over the weaker.'

This doctrine is a most flagrant contradiction of the conception of personal freedom. It recognises only masters and slaves. By free men (*liberi*) it understands freed men (*libertini*). It equally contradicts the idea of Right or Law, which manifestly has a spiritual and moral significance: mere physical force ought to serve right and, if it pretends to be right, it has risen against its proper master[2].

Element of truth in the doctrine.

However, even the errors of this doctrine contain a residuum of truth. It makes prominent one element which is indispensable to the State, namely force (*Macht*), and has a certain justification as against the opposed theory which bases the State upon the arbitrary will of individuals, and leads logically to political impotence. It lays emphasis on realities and on facts, and warns us against vain attempts at realising the dreams of mere speculation, where natural forces resist.

Without force a State can neither come into being nor continue. Force is required within, as well as without; where force has produced firm and enduring results, it seeks and commonly obtains a connection with right, that is a recognition and purification by means of right. Without right the might of the stronger is brutal, it is the wolf that devours the lamb. United with right, it becomes worthy of the moral nature of man.

[2] 'Le plus fort n'est jamais assez fort pour être toujours le maître, s'il ne transforme sa force en droit, et l'obéissance en devoir.' Rousseau, *Contr. Soc.* i. ch. 3; quoted by Schmitthenner, *Statswissenschaft*, i. p. 13.

CHAPTER IX.

IV. The Theory of Contract.

Influence of the theory of the social contract.

Especially since the time of Rousseau, the doctrine that the State is a free work of contract, of convention between its citizens, has enjoyed great and wide-spread popularity. It flattered men's self-complacency; for every one might fancy himself a founder of the State: and it appeared to suit the wishes of all; for every one might interpret the terms of the contract as he chose. This theory obtained a fatal authority at the time of the French Revolution. By the help of it the old political forms were torn down, and manifold but unsuccessful attempts were made to erect on the ruins a new edifice which should please everybody. But, although this theory found especial acceptance as the justification of revolution, it had served before to defend the legitimacy of absolute rule[a].

[a] [It should be noted that the Theory of Contract is applied in different ways by Hobbes, Locke, and Rousseau. According to Hobbes (*Leviathan*, ch. 17) men only pass from the 'state of nature' to the social state by surrendering their rights to a sovereign (one, few, or many). Locke (*Treatises on Government*, Book ii. ch. ii. § 6) supposes rights, e.g. of liberty and property, to exist in the state of nature: by the 'original compact' (Locke uses the term 'compact,' not 'contract') a form of government is instituted to secure these rights (c. viii). According to Rousseau men pass from the state of nature to the social state by the social contract (as on Hobbes's theory), but the sovereign to whom each surrenders his rights is 'the people,' so that each is sovereign as well as subject (*Contr. Soc.* i. c. 6). This sovereignty is inalienable (ii. c. 1): a government is not instituted by a contract (iii. c. 16); the government is only the minister of the General Will. Thus, according to Hobbes, a revolution against the *de facto* government, which he identifies with the sovereign, implies a return to the state of nature,

What was said of the theory of force applies conversely in this case. The theory of force, as a rule, favours despotism, but may, exceptionally, excuse the results of revolution. The theory of contract is especially favourable to anarchy, but exceptionally defends the oppression of minorities by arbitrary majorities, or the tyranny of a conqueror over those who have surrendered to him.

The theory unhistorical.

This theory claims universal validity. It makes the rise, and in a certain sense also the continuance, of all States depend on contract. But history does not afford a single instance in which a State has really been brought about by contract between individuals. There are indeed particular cases of contracts between two or more States which have produced a new State: there are also some cases in which princes and chiefs have, by a contract with particular classes or estates of the people, produced new constitutions: but there is no instance in which a State has been formed like a trading or an insurance company by its 'equal' citizens. The opinion that the continuance of States depends upon a perpetual renewal of contract between individuals, receives as little support from history. Rather do we find that the individual is born as a member of the State, and is begotten, born and educated with the particular characteristics of his nation and his country before he is in a position to have and to express a will of his own.

The evidence of history is thus absolutely opposed to this theory. Even at the time when the doctrine of social contract was most widely accepted and exercised most influence, it was contradicted by manifest facts. The people was broken up into 'free and equal citizens,' but even in the primary assemblies the minorities did not contract with the

anarchy, and is quite unjustifiable. According to Locke, a revolution might be justifiable, where the government had ceased to fulfil the trust reposed in it, i.e. to protect personal rights. According to Rousseau, a revolution would be only a change of ministry. Contrary to what is very commonly supposed, Locke does not speak of any contract between government and people. His theory is almost identical with that of Rousseau. Cp. T. H. Green, *Works*, ii. pp. 366-396.]

majorities, who carried out their will as if it had a superiority and validity of its own. The Constituent Assembly was indeed regarded as a selection and a representation of all the citizens, and had as its appointed task to agree upon a constitution; but even here the form of procedure was that of a décision of one united body, rather than of a contract between a number of individuals. People adopted a *fiction* of contract, and deceived themselves and others by speaking of the consent of individuals, where the majority, as organ of the whole, was exercising an authority which was often an intolerable tyranny[1].

The theory illogical.

This theory may be disproved not only by history but by logical criticism. It assumes the freedom and the equality of the individuals who conclude the contract; but political freedom, which is here presupposed, is only conceivable in the State, and not outside it. Man has indeed the aptitude for this freedom, just as he has the impulse to, and the need for, the State, but this freedom can never be realised, except in the organic freedom of the State. Further, if individuals were only equal, a State could never come into being, for it implies as a necessary condition political inequality, without which there is neither ruler nor ruled[2].

The main error lies in representing individuals as contracting. If individuals make contracts, private rights are created, but not public rights. What belongs to the individual as such, is his private property, his individual possessions. With that he can deal, one like another can make contracts about it. But contracts cannot have a political character unless there is already a community above the individuals; for a contract, if political, does not deal with the private good of individuals, but with the public good of the community.

[1] Rousseau (i. c. 5) feigns an original unanimity which creates the subsequent law of majorities: 'La loi de la pluralité des suffrages est elle-même un établissement de convention et suppose, au moins une fois, l'unanimité.'

[2] Arist. *Pol.* ii. 2, § 3, 1261 a. 24: *οὐ γὰρ γίνεται πόλις ἐξ ὁμοίων· ἕτερον γὰρ συμμαχία* (an alliance) *καὶ πόλις.*

Thus, neither a nation nor a State can arise out of contract between individuals. A sum of individual wills does not produce a common will. The renunciation of any number of private rights does not produce any public right.

Practically dangerous.

For practical politics this doctrine is in the highest degree dangerous, since it makes the State and its institutions the produce of individual caprice, and declares it to be changeable according to the will of the individuals then living. It destroys the conception of public law, instigates the citizens to unconstitutional movements, and exposes the State to the uttermost insecurity and confusion. It is to be considered, therefore, a theory of anarchy rather than a political doctrine.

Yet contains an element of truth.

Nevertheless, it contains an element of truth. In opposition to the theory which sees in the State a mere product of nature, it accentuates the truth that the human will can determine and influence the formation of the State; and in contradiction to a thoughtless empiricism, it vindicates the rights of human freedom and the rationality of the State.

Notes.—1. The famous sentence of Aristotle (*Pol.* i. 2, § 12), that the State is prior to the individual citizen as the whole is prior to the part, contradicts the idea that the State can be made out of individuals. The political individual, the citizen, is only a member in the body of the State, and can have no separate existence apart from his connection with it.

2. The error of founding the State upon individual will is connected with the more widely accepted error of supposing that Right or Law (*Recht*) is the product of Will. Certainly the free will of man is able to affect and alter in many ways what is right and just, but the greatest part of this has been fixed from everlasting by the order of the world and the nature of men and circumstances, and is altogether independent of the will of men. Most Right is not invented, but discovered and recognised, found not formed. 'Thou shalt' has greater influence in the production of law than 'we will.' Even Hegel, who derives Right, not from 'the particular individual will,' but from 'the true will,' which is 'in and for itself,' has not properly comprehended the nature of Right, although he has completely seen the error of the theory of contract. Compare *Philosophie des Rechts*, § 258.

3. The Genevese citizen J. J. Rousseau by his brilliant dialectic obtained the victory for the theory of contract in public opinion. Another

Haller's views on the State.

Swiss, the Bernese patrician, Ludwig von Haller, attacked the prevalent doctrine of the law of nature with great energy, and thoroughly refuted the theory of contract. He was less successful in the positive part of his system, which he called 'Restoration.' His doctrine ought not to be confounded with the theory of force: but he is the teacher of reaction, as Rousseau was of revolution.

Haller founds the State upon 'the natural law that the stronger rules.' In the superiority of the one, and in the need of the other, he recognises the basis of all rule, and of all dependence. He calls it an external, unalterable ordinance of God, but this shows that by might he does not mean the same thing as force, and he carries out the opposition between them. 'Power is limited by duty, by the moral law which God has written on the hearts of men, which reveals itself in the conscience of children, and in all times among all peoples: 'Shun evil and do good,' and 'Injure no one and leave to every one his own.' The law of justice and the law of love guard against power (*potentia*) degenerating into violence (*vis*). These two laws are implanted by God in man, they are innate, they are universal and necessary, eternal and unalterable, they are intelligible to every one, and the highest and mightiest, to whom all other human laws must submit, cannot be dispensed from the observance of them by any one. They are also the mildest and most loving, their yoke is easy and their burden is light. Not the will of the whole people, not the common good, not even the fear of man's violence, but the will of God alone is the basis of this law of duty. Thus it is valid even for the powerful, every transgression of it is a forbidden misuse of force, whether committed by the meanest head of a house or the greatest potentate—a want of justice or a want of love. Justice must be demanded from the strong as from the weak. Love and benevolence must be expected from the better part of the human heart. Against the possible misuse of the highest power there is no help to be found in human arrangements. There is no human judge over the sovereign. There is no help except in God. 'The belief in God,' as Plutarch says, 'is the bond and cement of all human society, and the support of justice.' Religion alone can keep power in its limits, and strengthen the weak.

We have reproduced the chief points in Haller's doctrines in his own words. It is obvious that he derives Right and the State, not from justice but from power, and regards the former only as a limit of the latter. Might and might alone produces right. The greater the might, the higher the right. Whereas, in truth, might alone is only *de facto* and not *de jure*. This train of thought pervades the whole system. Reverence for actual power often prevents him seeing the ideal moral character of Law; the desire to secure the highest power, and the right of the sovereign against every infringement sometimes becomes contempt and hatred towards every endeavour to secure the rights of subjects against

misuse of supreme power, and to limit its exercise—as if it were a crime to protect the divine law of duty by human arrangements against human violation. He is therefore a declared opponent of the whole constitutional system, and he works out in an extreme manner the mediæval idea that sovereignty is a property.

[For a criticism of this chapter of Bluntschli's see A. Fouillée, *La Science Sociale Contemporaine*, ch. i. M. Fouillée defends the theory of Social Contract as an expression of the *ideal* of the State.]

CHAPTER X.

V. The Natural Sociability and Political Consciousness of Man.

The State arises from the social impulses of human nature.

It is not enough to refute the current speculative theories. We have still to discover the one common cause of the rise of States, as distinct from the manifold forms in which they appear. This we find in human nature, which besides its individual diversity has in it the tendencies of community and unity. These tendencies are developed, and peoples feel themselves to be nations, and seek a corresponding outward form. Thus the inward impulse to Society (*Statstrieb*[a]) produces external organisation of common life in the form of manly self-government, that is, in the form of the State.

This social impulse passes from the unconscious to the conscious stage.

This social tendency works at first instinctively and unconsciously. The many look up, half with trust and half with fear, to a leader by whose courage and genius they are impressed, and whom they honour as the supreme expression of their community. They arrange themselves under him, and obey his commands. Gradually, however, with advancing civilisation and experience, the hidden impulse reveals itself, and there is formed a consciousness and a will of the State, first of all, as is natural, in the leaders and chiefs of the people: in them it becomes an active consciousness and an ordering and effective will of the State, while the mass of the governed does not as yet advance beyond a passive

[a] [Compare Aristotle's phrase: *φύσει ἡ ὁρμὴ ἐν πᾶσιν ἐπὶ τὴν τοιαύτην κοινωνίαν*, *Pol.* i. 2. § 15, 1253 a. 30.]

consciousness of the State. Gradually this consciousness extends itself among the higher, and at last also among the lower classes and orders of Society, and becomes even among them active and effective.

This assumption of a political tendency in human nature at first unconscious, but afterwards conscious, does not contradict the historical origin of States, but explains them.

Among the powerful it rises to the passion of domination, among the weak it becomes servile submission, but among the free it is enlightened by understanding and filled by that moral self-consciousness which is in harmony with the moral common consciousness. Only the free State is a true State, for only in it is there a common political spirit (*Statsgeist*) permeating all classes of the people.

This view contains the truth in the various false theories.

This view, which had already been expressed by the ancients[1], contains all that is true in the false speculative theories, without the accompanying errors. The State is *indirectly* divine, since God has implanted the social impulse in human nature, and has, in this way, willed the realisation of the State. Sound religious feeling is thus not injured by our declaring the State to be, in the first place, the appointed work of man. Again, our view recognises the significance of the real force which is indispensable for the formation of the State; for the essential power depends upon the common impulses of human nature. Finally, the element of free will has its rights accorded to it; but instead of scattered individual wills, we recognise the common will of the nation or the State.

This general will exists in germ among a people as naturally as the tendency to union and organisation, which we call the political tendency. This common will, in manifesting itself, becomes the will of the State, whereas mere individual will remains individual even if two individuals make a contract between them. Thus the proper expression of the common

[1] Cp. *supra*, p. 297. Cp. also Cic. *de Rep.* i. 25: 'Ejus (populi) prima causa coeundi est non tam imbecillitas, quam *naturalis* quaedam hominum quasi congregatio.'

will is not a Contract, but a Law (*Gesetz*) in the case of permanent regulations, an Order (*Befehl*) in the case of administrative police, a Judgment (*Urtheil*) in the administration of justice. The State has in itself organs which enable the common will to become conscious of itself, to resolve, and to carry out its resolutions.

The State a necessary good.

The State is thus not an arrangement only for the purpose of taming evil passions. It is not a necessary evil, but a necessary good. Only by the realisation of the State can peoples and humanity, taken collectively, manifest their real inward unity and attain to a free corporate existence. The State is the fulfilment of common order, and the organisation for the perfection of common life in all public matters.

Thus understood, the State is in the first place a human and terrestrial formation; but nothing prevents us from placing alongside of the religious ideal of an invisible Church, which is a community of spirits united by religion, the political ideal of an invisible State which is a community of spirits united politically. Theologians speak of a more perfect Church in heaven, and so the statesman may consider the earthly State as only a preparation for the heavenly.

But the actual State is that in which we live and work. Political science has to do with it alone, and such a State is to be completely explained and understood from a consideration of human nature.

BOOK V.

THE END OF THE STATE.

CHAPTER I.

THE STATE AN END OR A MEANS? HOW FAR IS IT END OR MEANS?

THE question is often raised whether the State is an end or a means? i. e. whether the State has an end in itself (*Selbstzweck*), or simply serves as a means to enable individuals to attain their ends?

Ancient theory—the State as an end.

The ancient theory of the State, especially that of the Greeks, regarded the State as the highest aim of human life, as perfect humanity, and was therefore inclined to regard the State as *an end in itself*. As compared with the State, individual men appeared only as parts, not as beings with separate personal rights. The State did not serve the individual, but the individual the State, as the member serves the body. The welfare of private men was therefore unhesitatingly sacrificed to that of the State, and in fact the former was only so far justified and valuable as it was serviceable to the welfare of the State. In the same way individual freedom was only regarded as a part of national freedom, and met with neither encouragement nor protection when it sought to go its own way in opposition to the general welfare of the nation and the State.

Modern theory—the State as a means.

In complete opposition to this fundamental theory of the ancients is the opinion, which has been often maintained by English and American writers, that the State is not an end in itself, but is simply a *means* to secure the welfare of individuals. Macaulay repeatedly throughout his works[a] main-

[a] [See *Essay on Machiavelli*, in *Essays* (Popular Edition), p. 47.]

tains that the chief defect of ancient politicians and of Machiavelli lies in the fact that they do not, like the moderns, recognise the great principle that 'societies and laws exist only for the object of increasing the sum of private happiness.' This modern school regards the State simply as an institution or machine which gives to individuals security for their life, their property, and their personal freedom, or at most as an artificial creation designed to raise and promote the welfare and happiness of all individuals, or at any rate of the greater number. Since the time of Bacon this opinion has been zealously defended by many politicians, and even by theorists. No one can really deny it who sees in the State only a collection of individuals. Macaulay believes that the improvement in the conduct of public affairs in recent times is chiefly due to the influence of this theory. Robert von Mohl considers it preposterous to attribute equal importance to men and to a mere institution for their welfare.

One-sidedness of both theories.

It seems to me that both the ancient and the modern view contain a germ of truth; but both commit the error of regarding only one side of the matter and of overlooking or denying the other side.

The form of the question itself, whether the State is a means or an end, leads to this one-sidedness and therefore to error. From one point of view a thing may be regarded as a means for obtaining other ends, from another as containing its end in itself. A picture is often a means of obtaining a livelihood for the artist or a profit for the picture-dealer. Yet a true work of art is to the artist the aim of his highest effort; he sees in it the expression of his most vivid feelings, the embodiment of his ideal. In this way it has its end in itself. So, too, marriage serves undoubtedly as a means for husband and wife to satisfy their individual needs, and to open to both a more happy existence. But marriage is also the union of two sexes separated by nature, and on this union is founded the family, i.e. a higher collective unit, to which the individual existence of

all its members is subordinate. Each member of the family is willing to sacrifice a part of his personal interests and will to the higher end which is involved in marriage and the family.

The same is true of the State. On the one hand it is a *means* for the advantage of the individuals who compose it. From another point of view it has an *end in itself*, and for its sake the individuals are subordinate, and bound to serve it.

Danger of the ancient theory:

The one-sided view of the ancients, which overlooked the individual in the nation, seriously endangered his liberty and his welfare, and led up directly to the conception of the omnipotence, which easily degenerated into the tyranny, of the State.

of the modern theory.

The equally one-sided view of the moderns, which is unable to see the wood for the trees, fails to recognise the majesty of the State, and thus tends to dissolve it into a confused mob of individuals and to encourage anarchy.

Modern consideration of the individual.

The ancients failed to give sufficient attention to an important task of the State, viz. the protection of personal freedom and the promotion of the personal welfare of the majority. Modern politics can claim the merit of having recognised this function of the State, and of having brought it into more general practice than the ancients did. In the present day a policy is justly regarded as contemptible and hateful which treats the welfare of individuals as a ball to be tossed about at the caprice of rulers, or dropped altogether at the dictation of circumstances. It is acknowledged now that law and its administrators do not merely exercise rule over individuals, but render very essential and important services to them. A large number of useful and beneficent public institutions in the present day owe their origin to this view. It is to it that we must trace the modern development of personal freedom, and especially of freedom of opinion. It has been applied by Christianity to the religious life, and by the Teutonic sense of law to the whole legal existence of the individual.

The State a reality.

But in spite of this it is a logical and political error to maintain that the State exists only for the sake of private individuals, and that the administration has no object but to care for their welfare. Such a contention would destroy the very essence of the State, and would reduce Public Law (*Statsrecht*) into a mere preliminary condition of Private Law (*Privatrecht*). In all nations of a manly spirit there are thousands of men who, when the State is in danger or need, will undertake heavy burdens, and will endanger both the peace of their families and their own lives. This spirit of self-sacrifice can only be explained on the supposition that these men prefer the safety and welfare of their State and nation to their own. The deeds of ancient heroes would be the folly of idle fanaticism if the State were only a means of serving individual interests, if the collective life of the nation had not a higher value than the life of many individuals. In the great dangers and crises of the national life it becomes clear to men that the State is something better and higher than a mutual assurance society. When the love of fatherland is kindled, it melts the selfish ambition of the individual, and when once the sense of duty towards the State is awakened in the masses it inspires and elevates them.

Their welfare inseparable.

Just as the nation is something more than the sum of persons belonging to it, so the national welfare is not the same as the sum of individual welfare. It is true that a close relationship exists between the two, and that they usually rise and fall together. If the individual welfare of the majority is diminished, that of the State is usually suffering from serious evils. But the lines and direction of the two are not always parallel. Sometimes they cross each other, and sometimes they are altogether separate. Every now and then the State is compelled, either for its own preservation, or in the interest of future generations, to make heavy demands from its present members, and to impose weighty burdens upon them. It sometimes happens, also, that the needs of individual welfare call for extra-

ordinary aid and support from the State, which thus incurs serious obligations.

It follows from this that we must examine more closely under what conditions the State is a means for individual interests, and under what conditions and within what limits the State, as an end in itself, is justified in demanding the subordination of its individual members.

[Cp. Fouillée, *Science Sociale Contemporaine*, p. 253: 'En un sens, la société humaine n'est qu'un moyen; en un autre, elle est une fin, parce qu'en dernière analyse elle se résout en une multiplicité innombrable d'individus qui travaillent chacun pour le bien de tous et tous pour le bien de chacun.']

CHAPTER II.

FALSE VIEWS OF THE END OF THE STATE.

1. That it is to maintain the ruling power.

IT has often been asserted in theory, and still more often in practice, that the real end of the State is the *rule of the supreme power*, especially of *princes* over their subjects.

If the maintenance of this rule were the end of the State, the logical conclusion must be that the ideal State should be as absolute and as extensive as possible, so that the final aim of political effort would be absolute universal monarchy, or rather universal despotism. This would make it impossible to reconcile national freedom with the development of human powers.

The whole conception has its origin, not in human nature, nor in the social impulses which nature has implanted in mankind, but in the ambition of rulers and their haughty desire to exalt themselves.

Aristotle long ago condemned this opinion in the famous dictum[1], 'All constitutions which regard only the private good of the rulers are corruptions or perversions of the normal constitutions.' It is forgotten that a nation exists within the State; that the subjects are men like their rulers, and possess the same human capacities, feelings and powers; that it is therefore preposterous to regard the one class as the

[1] *Politics*, iii. 6. 1279 a, 19.

sole possessors of political rights, and the others as simple objects of their rule, as things. All the arguments against slavery are equally valid against this sort of despotism.

Rule is unquestionably an attribute of the power of the State, but it is not the end of the State; on the contrary it is a means to realise the end of the State. It is rather a duty towards the nation than a right to be enjoyed by the ruler.

Rule therefore requires to be limited and defined by the constitution. The ideal of a State which approaches as nearly as possible to perfection does not consist in absolute, but in constitutional, i.e. *relative* rule. It often happens that some form of government, originally founded with good intentions, ceases in time to suit the altered conditions of a nation. In such a case it cannot be the duty of a healthy policy to leave this system unaltered just as it was inherited from previous generations: on the contrary, one's aim should be to improve the now useless system, and to restore harmony with the other conditions of the national life.

2. That it is to carry out the divine will.

According to the theocratic theory, the end of the State is the *realisation of God's kingdom upon earth.* Stahl[1] says: 'The duty of the State depends upon the service of God. It should establish the rule of God, and maintain justice, discipline, and morality, which are God's commands for social life.' In the middle ages this conception was generally believed both by Christians and Mohammedans. But the modern world, while granting the religious importance of this view, and fully comprehending how the whole machinery of the world was revealed to the pious spirit by the light of the divine administration, utterly rejects the erroneous and fatal way in which divine rule was applied to direct the conduct of human affairs.

The comparison on which the idea of theocracy rests, that the prince rules over a nation as God rules over the world, is obviously false. God's rule over the world is the rule of

[1] *Rechtsphilosophie*, ii. 2.

an absolute over relative beings, of the creator over his creatures: we cannot discover his origin, nor can we define its methods or its objects. The rule of a prince over a nation is the rule of a man over men, i.e. similar beings; the prince's life is guided and his qualities limited just as those of his subjects, and the latter are fully capable of criticising him from a human standpoint.

The comparison of a prince with God is therefore false from every point of view, and, as it leads to pride and excessive self-esteem, it is also harmful. The end of the State must be recognisable by men, it must be determined by human nature, and it must be at any rate nearly attainable by human effort.

3. That it has to secure some external object.

It is altogether erroneous to place the end of the State *outside* the people and country which form it, so that it becomes merely a means to secure external objects.

The clerical party has been accustomed to prove the necessity of the States of the Church by pointing out that the independence and authority of the Roman Catholic Church require a Pope who shall be at the same time sovereign ruler in Rome. They fail to perceive that this argument clearly tells against the temporal power. For by it they deny the independence of the Papal States, and with it their character as a State, because no State can exist as the slave, wanting both will and legal rights, of some external power, even though this latter be the Roman Catholic Church. They presume that the Roman people who compose this State have submitted to a political serfdom in the interests of a religious and non-political community, a presumption which is equally opposed to the character of the people and to the religious nature of the Church.

History has declared its judgment upon this enormity. Rome now belongs, not to Catholic Christendom, which is divided into many States, but to the Roman, or rather to the Italian, nation, of which the Romans are members.

But even in the present day there are several examples of the same error. The principality of Lichtenstein obviously

does not exist for the sake of the small village of Lichtenstein and its scanty population. It serves only for an external object, viz. to support the rank and dignity of the princely dynasty which lives outside the country at the imperial court of Austria. This is obviously a State which has not its end in itself.

CHAPTER III.

INSUFFICIENT OR EXAGGERATED VIEWS OF THE END OF THE STATE.

1. That its end is to secure the rights of person and property.

AFTER Kant and Fichte the opinion long prevailed in Germany that the true end of the State was merely the *assurance of rights*, and especially those of person and property.

Kant (*Rechtslehre*, §§ 47–49) expressly declared that 'the safety (i.e. the end) of the State does not consist in the welfare or happiness of the citizens, but in the agreement of the constitution with the principles of law.' Fichte (*Naturrecht*, in his *Works*, iii. 152) maintains that 'the assurance of the rights of all men is the only general will' (i.e. the will of the State). Starting from this view of Kant, Wilhelm von Humboldt assigns very narrow limits to the activity of the State, and defines its end as 'the maintenance of security against both external enemies and internal dissensions [a].' Even in our own century, when the idea of nationality is so strong, Eötvös (*Moderne Ideen*, ii. 91) maintains that 'the end of the State is the security of the individual.'

This opinion arose in the latter half of the eighteenth century [b]. In those days men sought to find some funda-

[a] [Humboldt's *Sphere and Duties of Government* supplies the motto to Mill's *Liberty*. For Mill's views cp. also his *Pol. Econ.* Book V. In practice however Mill allows the State very extensive functions. Much more extreme is the view of H. Spencer. *The Man v. the State.*]

[b] [It is as old as the Greek sophists. Cp. Arist. *Pol.* iii. 9, § 8, 1280 b, 10, where Lycophron the Sophist is said to have held that 'Law (ὁ

mental limitation to the over-government of that enlightened despotism which, benevolent as it was, proved oppressive and destructive of personal freedom, and which was accustomed to justify every interference with family life, with the free choice of a career, and with the administration of private revenues, by a professed regard for the general welfare. The definition of the end of the State as the maintenance of legal security seemed to offer a convenient weapon for opposing this over-government successfully, and the State thus limited was termed a *Rechtsstat* (Legal State), in opposition to the detested *Polizeistat* (Police State)[c].

This narrowing of public life by restricting the end of the State failed to satisfy either the instincts or the necessities of modern nations. No one doubted that the maintenance of legal security is one of the duties of the State, but no modern nation or government could allow its political activity to be limited to so narrow a domain. Even the champions of the opinion were compelled by their personal experience to break through these limits, and to direct their policy to higher ends. Fichte began by asserting that the 'protection of property' was the chief end of the State, but in the great struggle against the universal despotism of Napoleon, which was willing enough to protect property, he rose to the conception of a national State, which should serve as the organ of the national spirit. As a Prussian minister, Wilhelm von Humboldt strove to effect the intellectual advancement of the Prussian nation by means of State-schools, though in his theory he had condemned them, and to extend the power of the Prussian State, though it was already amply sufficient to enforce civil and criminal law.

νόμος) is only concerned with the securing of mutual rights and is not able to make the citizen good and just (ἐγγυητὴς ἀλλήλοις τῶν δικαίων, ἀλλ' οὐχ οἷος ποιεῖν ἀγαθοὺς καὶ δικαίους τοὺς πολίτας).' See Oncken, *Staatslehre des Aristoteles*, i. p. 217. Locke, *Treatise on Government*, Book II. ch. ix, holds that the end of political society and government, or, as he expresses it, the reason why men enter into society, is that every one may the better preserve himself, his liberty, and property.]

[c] [See above, Book I. ch. vii. p. 68.]

Defects of this view.

In fact this formula about legal security does not exhaust the end of the State, and especially of the civilised State of modern times: it would correspond much more to the views of the middle ages, which did not advance far beyond the conception of private law.

The sense of law (*Rechtssinn*) is not the only active force in a nation. It has also a number of *economic* necessities, which have nothing to do with legal security, such as roads, canals, railways, posts and telegraphs. The State alone can satisfy these needs, and it would not venture to do so if its sole end was the assurance of rights. Again, the nation has important *intellectual interests*, national schools, schools of science and art, technical schools. For these the care of the State is indispensable; it is impossible to leave them to the chance of private caprice or to the calculating authority of the Church, which is always seeking to bring the State under its own control. The middle ages neglected these interests because they adopted this narrow view of the State as an institution for maintaining legal security.

Moreover, the nation is a *political being*, which is concerned not only with the making and administration of laws for the security of private rights, but in a far higher degree with political government and the development of its liberties.

Its results.

This insufficient definition of the end of the State, when practically applied, has the following results:—

(*a*) The neglect of economic interests.

(*b*) The neglect of common intellectual interests.

(*c*) The paralysis and death of public spirit in the nation, and thus the weakening of the power of the State.

(*d*) The encouragement of a petty and pedantic system of law, the result of which is a litigious temper fatal to the authority of the State.

2. That its end is to secure general happiness.

Another equally prevalent view, that the *general happiness* is the true end of the State, is as much too wide as the former is too narrow. The happiness of men is for the most part independent of the State. Even most of the material goods on which human welfare is dependent, e. g.

dwelling, food, clothing and income, are acquired, not through the State, but by the labour and saving of individuals. Still more is this true of the spiritual goods, on which the ideal wealth and happiness of mankind are founded. It is not the State which endows men with their talents and capacities; these are the gift of nature, and they differ in individual cases instead of being common to all. The State can confer on no one the delights of friendship and love, the charm of scientific study or of poetical and artistic creation, the consolations of religion, or the purity and sanctification of the soul united with God.

Men are not citizens in their whole life and being; they have their own natural endowments and their special duties. The State rests upon the community of the nation, not upon the differences of individuals; its end therefore cannot embrace all the ends of private life.

This error, like the other, has serious and harmful results when practically applied :— Harmful results of this view.

(*a*) The State is led to encroach upon departments which do not belong to its rule, and to exercise tyranny when it ought to restrict itself to the protection of private freedom.

(*b*) The State being really incapable of managing these departments of private life, will by unskilful handling do harm and obstruct the natural development, in spite of its desire to increase the sum total of private happiness.

(*c*) As the State strives after unattainable objects and squanders its forces in a false direction, it will be led away from its true aims, and will lose part of its power to accomplish those duties that lie to its hand.

This error proved a source of serious evil to the political life of antiquity; but the party of enlightenment in the eighteenth century went astray in the same manner. The end of the State in modern politics must be more accurately defined and limited.

CHAPTER IV.

THE TRUE END OF THE STATE.

Only one general end of the State.

THERE is only one conception of the State, although it is realised in very various ways among different nations and in different lands and periods. Logic, therefore, compels us to accept also one general view of the end of the State, in spite of the fact that in history the different nations who form States strive after very various objects. The unity of the common end admits of these special differences, but it combines and harmonises them. Robert von Mohl (*Encyclopädie*, p. 73) was right in asserting that each nation has to pursue various objects according to its special character and needs; but his theory wanted that unity of conception which is necessary to prevent hopeless diversity and deviations in the conduct of the State. On the other hand, von Holtzendorff (*Politik*, B. iii), who has treated this subject with special attention, gives the name of 'harmony of the ends of the State' to what we call the unity of the end.

'Justice' is too narrow.

The question now arises, how is this single and supreme end of the State to be formulated? Many say that it is justice, the realisation of law. This definition seems to us too narrow, and it is erroneous if law is held to include both public and international law, and is not limited to the legal security of individuals (comp. Chapter III). Law is rather a *condition* of politics than its end: *justitia fundamentum regni*. And the life of nations is not only a judicial life; there is also the economical and intellectual life, and the life of the national power. Even the legal-minded Romans did not consider *jus* to be the supreme end of the State.

'Morality' is too wide.

Hegel, as Plato long before him, says that the end of the State is morality (*Sittlichkeit*) and the realisation of the moral law. But the two powers which determine and condition the moral life, viz. the spirit of God and the spirit of the individual man, are both outside the control of the State. The domain of morality is far more comprehensive than the domain of politics; and if the State attempts its control it oversteps its proper limits, and exerts a harmful influence upon morality.

The securing of the public welfare,

The Romans saw the real function of the State in the *public welfare*. Their two expressions, *res publica* and *salus publica*, are logically as well as verbally connected; they are, in fact, as substance and quality, as potentiality and realisation.

This formula of the end of the State has been frequently misunderstood, mainly because attention has been given, not to the community (the *res publica*), but to the crowd of individuals, or to the wiles of rulers. It has been used too often to excuse the arbitrary despotism either of princes or of majorities, and it has been completely discredited by the horrors of the Parisian Committee of Public Safety (1793–5).

is not incorrect,

But the expression is really above criticism, if one regards the natural limits of the State, and especially the judicial order and administration, and if one avoids trespassing upon matters outside those limits, such as the free life of the individual and of religious communities. To every statesman the welfare of his nation has been the first object to strive for, and every patriotic citizen is enthusiastic for the safety of his fatherland. The public welfare is therefore an indispensable object of policy, and its promotion is undoubtedly the chief duty of the State. This definition of the end of the State includes also the development and perfecting of law, and generally the improvement of all common relations and conditions of life. It includes also the administration of law, which is necessary to secure the peaceful course of the common life, and which prevents or punishes wrongs by which the community is harmed. This political principle

of the Romans, *salus populi suprema lex esto*, does not err in being too narrow, but rather in straining the power of the State, and extending it to alien matters.

but is insufficient in times of crisis.

Still, from one point of view, the expression is insufficient. Although in ordinary times policy aims at securing the national welfare, yet there are moments in a nation's life when it has to face extraordinary duties. There are circumstances in which the State, like an individual, must risk its existence, and with it the national welfare. At such a time it may be a patriotic duty to resign a life which cannot be prolonged with honour. Suppose that an enemy of overwhelming power offers to a small nation many external advantages, such as decreased taxation, the security of peace, or a better administration. A simple regard for the public welfare would dictate the acceptance of the offer, while its rejection might bring disaster or even ruin upon the State. Nevertheless it might be a fatal duty to prefer death with honour rather than voluntary submission to the foreigner; and it is possible that a heroic and desperate struggle may secure a subsequent revival of the State. A splendid example of this was given by the Athenians in the time of Themistocles. Sometimes ruin is the necessary and worthy termination of an existence that is no longer possible. The tragic fate of Carthage or of Jerusalem may be deplored, but in both cases it was inevitable. Sometimes, too, a small State must perish because its people are no longer capable of maintaining their independence, and because it is called upon to enter into the higher collective life of a nation. No unprejudiced German or Italian would deplore the destruction of those petty States which had become useless and impotent, but would rather glory in their fusion into a larger and more important whole. In such cases our formula about the public welfare is insufficient, unless it is applied to the new community.

The true definition.

But all these objections are avoided if we formulate the proper and direct end of the State as the *development of the national capacities*, the *perfecting of the national life*, and,

finally, its *completion*; provided, of course, that the process of moral and political development shall not be opposed to the destiny of humanity. This formula includes everything that can be regarded as a proper function of the State, and excludes everything that lies outside the State's range. It regards the idiosyncracies and the special needs of different nations, and thus, while it firmly maintains the unity of the end of the State, it secures the variety of its development. The life-task of every individual is to develope his capacities and to manifest his essence. So, too, the duty of the State-person is to develope the latent powers of the nation, and to manifest its capacities. Thus the State has a double function. Firstly, the *maintenance* of the national powers; and, secondly, their *development*. It must secure the conquests of the past, and it must extend them in the future.

This general definition includes special tendencies.

Within this common end are included certain *special tendencies*. Very often these are pursued singly, and justification is sought in the peculiar character of some given nation, but this conduct is fraught with danger to the State as a whole. As illustrations may be mentioned:—

E.g. the development of external power;

(1) The *development of the national power* (*Macht*). The State must have power in order to maintain its independence and to enforce its decrees. It is only as possessing power that a State can exist and live. But States vary very much according to the kind and degree of this power.

(*a*) *World-powers* (*Weltmächte*) are States whose importance and activity extend far beyond their own domain: they play a decisive part in the politics of two continents or of the whole world, and therefore they are specially bound to care for the peace and order of the world (i.e. international law).

(*b*) *Great powers* (*Grossmächte*) are not necessarily world-powers, though every world-power is of course a great power. The world-power must be a maritime power, because it cannot exert its influence on the destinies of the world without the connexion given by the sea. But a great power may be simply a land-power, e.g. Prussia before

the formation of the German Empire. So, too, both then and now, Austro-Hungary is rather a great than a world-power. A great power also exerts an extensive influence far beyond the limits of its own country: it cannot be overlooked, nor can its voice be disregarded without danger when the relations of its own continent undergo important alterations. If at any time either of these powers abuses its strength to oppress other rightful States, the other powers are justified in resisting. Even a man of great genius, like Napoleon I, was unable to raise the great power of the French nation into a European supremacy, and the failure of this attempt led to his overthrow. So, too, Russia was not strong enough to subdue Turkey. Austria could not maintain its rule over Italy. The maritime supremacy of England has been at last compelled to admit the rivalry of other nations.

(*c*) *Intermediate* and *peaceful powers* (neutral States) are not strong enough to play a great part in foreign politics, and are mostly absorbed in domestic affairs. The policy of these States, modest as it is, has very great importance, not only for their own inhabitants, but also because it limits and moderates the dangerous currents of *la grande politique*.

(*d*) Real *petty States* have only a very dubious and insecure existence in our epoch, which prefers the formation of greater and stronger States. They can only secure themselves by seeking the protection of the great powers, or by attaching themselves to some stronger State. But in the middle ages the opposite tendency prevailed, and the peoples of Europe, especially the Germans and Italians, were inclined to favour the very smallest political units.

A State has two chief means for increasing its power in relation to foreign States, (1) diplomacy, and (2) the army and navy. A State which regards as its chief function the maintenance of its military strength, of the warlike courage of its members, and its armament, is called a *military State*. Examples of such a State are Sparta among the Greeks, and the kingdom of Prussia before the foundation of the

German Empire. When a State is threatened from without, or is growing to its necessary limits, this extraordinary strain of its military forces is inevitable. But in a normal State which has reached its full development, it must never be forgotten that military power is only a means, and not an end of policy, and that undue straining of this power will be harmful to the true ends of the State.

or of economic interests;

(2) Sometimes also it is *economic* interests which are specially prominent. Thus we speak of pastoral, agricultural, industrial, and mercantile States.

It is true that these interests are mainly those of private individuals, and only in a lesser degree interests of the whole nation. But on this very account, an exclusive or undue devotion to them leads to the neglect of the other functions of the State, and damages all other interests. Moreover, the public spirit of such nations is never fully developed, but is corrupted by the selfish and narrow devotion to private interests. In a pastoral State the nation will remain poor and ignorant; in an agricultural State men look with mistrust and disfavour upon the higher culture, because rude manners are the natural accompaniment of their primitive pursuits. To an industrial State the chief dangers lie in disturbances among the artisans and the exclusion of foreign commodities, while a mercantile State may be easily led astray by a shop-keeping spirit.

or of intellectual interests;

(3) The life of a nation may also be chiefly directed by *intellectual* interests, and thus arises what we may call an intellectual State (*Culturstat*). The military State of Sparta was opposed, in the time of Pericles, by the intellectual State of Athens, which has bequeathed to posterity undying proofs of its love of art and of the capacity of the Athenians for acquiring knowledge. Florence, Venice, and Antwerp have had periods in which intellectual interests have surpassed all others. The Chinese State in the present day is another example, although its culture is stationary rather than progressive; and both Zürich and Geneva pride themselves on giving special attention to their public schools.

Noble as these objects are, their excessive promotion, to the detriment of the other powers of the nation, is the sign of an unhealthy policy.

or of legal guarantees for freedom;

(4) In some States the chief function is considered to be the development of the legal guarantees for national and individual freedom, and thus arise free legal States (*freie Rechtsstaten*), as notably the Swiss Cantons and the States of North America. This formula of the end of the State lies, even more than those discussed above, at the heart of the general conception of that end.

or of national unity.

(5) Finally, when the consciousness of nationality gives the chief impulse to public life, when the manifestation of national unity seems to be the chief end of the State, we have *national States*. Such was France in former times, and such are in our own day the kingdom of Italy and the German Empire.

Indirect functions of the State.

Besides the proper and direct end of the State, which relates to the nation itself, we must consider all the indirect functions of the State, which relate merely to private life.

Here it is especially important to find some accurate definition of the limits of State action.

The duties of an individual may be formulated, like those of the State, as the development and manifestation of his individual character and capacity; but again, this must be in harmony with the ends of the family, of the nation, and of humanity. To fulfil these duties, *private freedom* is essential. It is, in the first place, the duty of the State to protect this private freedom against unjust attack, and especially to avoid any attempt on its own part to restrict or oppress it.

Limitations of State action.

A preliminary necessity is to form a clear conception of the way in which the State is limited by its own nature.

(1) The State is an external organisation of the common life. It has organs, therefore, only for things which are externally perceptible, and not for the inner spiritual life which has never manifested itself in words or deeds. It is therefore impossible for the State to embrace all the ends

of individual life, because many, and those the most important, sides of that life are concealed from its view and inaccessible to its power. The natural gifts of individuals are wholly independent of the State, which can give neither intelligence to the fool, nor courage to the coward, nor sight to the blind. The State has no share in kindling love within the heart; it cannot follow the thought of the student, nor correct the errors of tradition. As soon as questions arise about the life, and especially the spiritual life, of individuals, the State finds both its insight and its power hemmed in by limits which it cannot pass.

(2) The State is wholly based upon the common nature of men, and especially of its own people. Therefore it cannot control private life in what is essentially individual, but only so far as that life is affected by the common nature of all men and by common necessities. For example, the State can secure to all men equally the possession of a corporeal thing, which we call property, but it must leave to the individual the disposal and management of this property. The property of Paganini in his violin, of Liszt in his pianoforte, or of Kaulbach in his crayons, is a wholly different thing from the property of an unskilled person in those instruments. With this more subtle form of ownership the State has nothing to do, because it is individual and not common. So, too, the State can regulate in a rough and general way the conditions of marriage and the rights of married persons: in fact, it is bound to do so, because upon these depends the security of the family and the moral health of the nation. But the manner in which any particular marriage is completed, and the more delicate forms of family life, lie outside the control of the State. Wilhelm von Humboldt saw this, and was led astray into a desire to withdraw the institution of marriage from legal regulation, and to leave it altogether to private freedom. The Canon Law fell into the opposite error, and endeavoured to impose legal regulations upon matters which pertained to private freedom. When the State punished heresy as a crime, it overstepped

its natural limits and encroached unduly upon personal freedom.

(3) The rule of the State extends no further than that of *law*, because every rule which has the power of compulsion rests upon the foundation of law. But law in its turn is limited,

(*a*) By the necessity of the peaceful co-existence of individuals, or by the recognition of the necessary conditions of common life (private law, criminal law); and

(*b*) By the existence and development of the nation, to which the private life of individuals is subordinated so far as the security and welfare of the former demand (taxation, military obligations, constitutional and administrative law).

So far as law is in question, the State is the supreme authority, because the making and administering of law belong by their very essence to the State.

(4) The State can extend its administrative care, and therefore its influence, beyond the domain of judicial organisation, but it has then no power of compulsion, and its functions are limited to the support and encouragement of important social objects for which State help is needed (economical and educational measures of the State). The care of the State for the national welfare is here expanded into a care for the welfare of society, but only because the latter is in need of assistance.

[*Note.*—Besides the works of Mill and Spencer already referred to above, ch. iii. note *a*, the following books in English may be mentioned as dealing, from different points of view, with the limits of State action:—Burgess, *Political Science*, Part I. Book II. ch. iv; Cunningham, *Politics and Economics*; Donisthorpe, *Individualism*; Green, Lectures *On Political Obligation* in *Works*, ii, and Lecture on *Liberal Legislation and Freedom of Contract* in *Works*, iii; Goschen, *Address to the Edinburgh Philosophical Institution on Laissez-Faire and Government Interference*; Farrer, *The State in relation to Trade*; Jevons, *The State in relation to Labour* (these two last both in '*The English Citizen*' series); Mackay (editor), *A Plea for Liberty* (with introduction by H. Spencer); Montague, *Limits of Individual Liberty*; Ritchie, *Principles of State Interference*; Sidgwick, *Political Economy*, Book III; *Elements of Politics*, Part I; J. F. Stephen, *Liberty, Equality, Fraternity*; Woolsey, *Political Science*, Part II. ch. v.]

BOOK VI.

THE FORMS OF THE STATE.

CHAPTER I.

THE DIVISION OF ARISTOTLE.

Aristotle's division.

MORE than two thousand years ago Aristotle laid down a division of the forms of the State which must be regarded as the accepted view even in the present day. In making this division he started from the conception of sovereignty, or rather of governmental authority. In every State there is a supreme organ[1], in which power is concentrated and to which all other organs are subordinate. The form of this organ stamps a peculiar mark upon the State, and it is natural therefore to make it the basis of a division of States.

Normal States.

Aristotle calls all those States which regard the good of the community *normal* (*ὀρθαί*), while those which regard only the good of the rulers he calls *perversions* (*παρεκβάσεις*) of the normal State[2].

Starting from this conception, he finds three normal forms, each of which is accompanied by its corresponding perversion. 'The supreme power,' he says, 'must be vested either in an individual, or in a few (the minority), or in the many (the majority).' From this he derives the following normal forms:—

1. Kingship (*βασιλεία*), as Aristotle calls it, or Monarchy, the more common name now—the rule of an individual.

2. Aristocracy, the rule of a minority consisting of the best citizens (or exercised for the best interests of the State).

3. The rule of the majority, of the masses, is called by Aristotle 'Polity'[3]. In his day the democracy of the Greek

[1] Aristot. *Pol.* iii. 6. §§ 1, 2, 1278 b, 6.
[2] *Ib.* iii. 6. § 11, 1279 a, 17.
[3] *Pol.* iii. 7. §§ 1–3, 1279 a, 22 seq. [Cp. *Eth. Nic.* viii. c. 10.]

cities, especially of Athens, had degenerated, and therefore he avoids the term Democracy for the rule of the majority exercised for the common interests, and restricts it to the perversion of that rule. But in later times Democracy has become again the usual term for this third form of the State, and we shall employ it in that sense.

Perversions.

The three perversions are thus designated by Aristotle:—

1. Tyranny or Despotism, the rule of an individual exercised primarily in his own interests.

2. Oligarchy, the rule of the rich for their own advantage.

3. Democracy[4], in Aristotle's phrase, or, as we prefer to call it, Ochlocracy[a], the arbitrary rule of the poor (and, we may add, the uneducated) masses.

Quality more important than Quantity.

In making this division, Aristotle seems to have laid the chief stress upon the *number* of persons who share the supreme authority, just as in the Linnean system the number of stamens determines the genus of a plant. But this runs counter to his own fundamental principle, that the form of a State depends upon the *quality*, and not the *quantity*, of the ruling organ. Aristotle himself[5] saw the risk of this misconception, and therefore pointed out that

[4] Aristot. *Pol.* iii. 7. §§ 5–8. § 3, 1279 b, 4–26. Cicero, *de Republ.* i. 26, expresses the idea of Aristotle as follows: 'Quum *penes unum* est omnium summa rerum, regem illum unum vocamus, et *regnum* ejus reipublicae statum. Quum autem est penes *delectos*, tum illa civitas *optimatium* arbitrio regi dicitur. Illa autem est civitas *popularis*, in qua *in populo* sunt omnia.' The three perversions arise when 'ex rege *dominus* (fit), ex optimatibus *factio*, ex populo *turba* et *confusio*;' i. 45.

[a] [The term ὀχλοκρατία is first used for the lowest form of democracy by Polybius, vi. 4.]

[5] Aristot. *Pol.* iii. 8. § 6, 1279 b, 34 seq. [Cp. iv. c. 4.] Misled by several modern accounts of the matter, I had previously overlooked this, and had thus unfairly criticised the great political philosopher. Sparta was a monarchy, although two kings ruled together. [Not according to Aristotle. He calls it an 'aristocracy,' in the lower sense of the term, according to which it applies to a form of mixed government; *Pol.* iv. 7. § 4, 1293 b, 16; v. 7. § 10, 1307 a, 35. The Spartan kingship he considers only 'a hereditary generalship for life'—an office compatible with any form of government; iii. 15. § 2, 1286 a, 2.] Venice was an aristocracy, although there was a doge at the head of the State.

the difference of number is naturally connected with a difference of character in the ruling power, and that it is the latter which is the ultimate criterion. Nevertheless, he has not expressed himself definitely enough about the principles of quality.

Aristotle's division incomplete.

There is another point in which Aristotle's division requires correction. It is incomplete, because history shows us a number of States which do not come under any of his three normal forms. In all of them the supreme power belongs to men, whether it is to one man, or to the best, or to the people. But there have been States in which no human authority has been recognised, in which the supreme power has been attributed either to God, or to a god, or some other superhuman being, or to an Idea. The men who exercised rule were not regarded as its possessors, but as the servants and vicegerents of an unseen ruler, free from the weakness of human nature.

Ideocracy.

This fourth form of State, when directed to the welfare of the subjects, may be designated by the general term of Ideocracy (Theocracy); and its perversion may be called Idolocracy.

Note.—Schleiermacher (*Abhandlungen der Berl. Akademie der Wissensch.* 1814, *Ueber die Begriffe der verschiedenen Statsformen*) has maintained that the three ancient divisions, monarchy, aristocracy, and democracy, 'are always running into each other.' For example, in a democracy the leading men may resemble an aristocracy; and sometimes an individual, e.g. Pericles, may rule like a monarch. The same truth applies to a monarchy, and Mirabeau was right in saying (Speech of 1790 in his Works, viii. 139), 'In a certain sense republics are monarchical, and again in a certain sense monarchies are republics.' Nevertheless, the old division is by no means an empty one, and it is perfectly true that the form of the supreme power does give a definite stamp to the whole constitution of the State, and that the most important political principles stand in the closest relations to it.

CHAPTER II.

THE SO-CALLED MIXED STATE.

The Roman Republic.

EVEN in ancient times the attempt was made to add to Aristotle's division a fourth form, called the Mixed State[a]. Cicero especially declared the Roman State to be a model of this fourth form, a mixture of monarchy, aristocracy, and democracy, and maintained this form to be the best of the four[1].

What is meant by a Mixed State?

By a Mixed State may be understood one in which monarchy, aristocracy, or democracy are moderated or limited by other political factors, e. g. a monarchy may be limited by the formation of an aristocratic Senate or Upper House, and of a primary or representative Assembly of the people. In that case it is true that such a divided constitution is better than when an individual, or a few, or the majority rule absolutely and without restraint. But such a mixture as this does not create a new form of State, for the supreme governing power is still concentrated in the hands of the monarch, or of the aristocracy, or of the people.

On the other hand, if it is understood that the supreme

[a] [Aristotle himself recognised mixed constitutions: e. g. *Pol.* iv. c. 7.]

[1] Cicero, *de Republ.* i. 29: 'Quartum quoddam genus reipublicae maxime probandum esse censeo, quod est ex his, quae prima dixi, moderatum et permixtum tribus:' and i. 45; 'Placet enim, esse quiddam in republica praestans et regale, esse aliud auctoritati principum partitum ac tributum, esse quasdam res servatas judicio voluntatique multitudinis.' [Polybius (vi. 11) had previously described the Roman constitution as mixed. Plato (*Laws*, i. 712) treated Sparta as a mixed government, but without using the phrase. On the whole question, see Cornewall Lewis, *Use and Abuse of Political Terms*, pp. 72–90.]

governing power is itself divided between the monarch, the aristocracy, and the people, so that two supreme governments exist side by side, each independent of the other, then Tacitus is right in rejecting the idea of a Mixed State, and in maintaining that its existence, or at any rate, its continuance, is impossible[a].

The English Constitution.

In later times men have considered England to be a Mixed State of this kind, in which rule is divided between three supreme powers, King, Lords, and Commons, and they have asserted that the English Constitution is perfect, just because it is the ideal realisation of this mixed form. But it is an error to suppose that the English Constitution has arisen[b] from a division of the supreme governing power. It was the monarchy which, in old times, gave to the State its special form, and the monarchy has been gradually limited, first by a powerful aristocracy, and later by the admission of democratic elements. The external form of the State has always been monarchical, and to the sovereign is attributed not only the supreme governing power (the executive), but also the highest place in the legislative bodies or parliament[c].

The government, not the legislature, to be considered.

Moreover, it is generally forgotten that the principle of Aristotle's division does not rest on the nature and composition of the legislative power; for in any advanced State this is usually representative of the chief elements of the whole nation. On the contrary, it depends on the antithesis between the government and the governed, and upon the question to whom the supreme administrative power belongs. This latter cannot be divided, not even between

[a] Tacitus, *Ann.* iv. 33: 'Cunctas nationes et urbes populus aut primores aut singuli regunt: delecta ex iis et consociata reipublicae forma laudari facilius quam evenire, vel si evenit, haud diuturna esse potest.'

[b] [It is not the same question, whether a government is mixed, and whether it has arisen from a mixture. Cp. Aristotle's remarks about the Solonian constitution at Athens; *Pol.* ii. 12. §§ 2, 3, 1273 b, 35 seq.]

[c] [Throughout the book Bluntschli has been misled by exaggerating the power of the monarchy in the English constitution. For a more correct view, see Bagehot, *English Constitution.*]

a king and his ministers, for this would create a dyarchy or triarchy, and would be opposed to the essential character of a State, which, as a living organism, requires unity. In all living beings there is a variety of powers and organs, but in this variety there is unity. Some organs are superior and others inferior, but there is always one supreme organ, in which the directing power is concentrated. The head and the body have no separate and independent life, but they are not equal. So also for the State, a supreme organ is a necessary condition of its existence, and this cannot be split into parts, if the State itself is to retain its unity.

There is not, therefore, any such fourth form of State as has been called a Mixed State; and so far as mixture is possible, it is amply treated in a consideration of the three simple States enumerated above.

Note.—In our days there has been much talk of 'democratic monarchy,' and the formation of such States has been designated as the work of the age. If the expression implies that monarchy must now-a-days base itself upon the masses (the *demos*), and must stand in close connexion with them, it is correct, but such a State is a pure monarchy, and not in any sense mixed. If, again, it implies a monarchy limited by democratic institutions or, like the July-monarchy of 1830 in France, 'surrounded by republican institutions,' it has also a certain meaning; but in this case, as history shows, there is a danger that the principles of the two institutions may come into conflict, and that monarchy may be overthrown by the rising democracy or republic. But if it implies a mixing or division of the supreme executive power, so that it is half monarchical and half democratic, then it has no reasonable meaning. and a State so constituted could not possibly endure. The French Constituent Assembly of 1789 believed, with Rousseau, in the possibility of such a division of the sovereignty between two equal powers, one of which should belong to the nation, and the other to the king. But as soon as it was practically tried, the system showed itself inconsistent and unmanageable. Pinheiro-Ferreira (*Principes du droit public*, § 475) declares that monarchy to be democratic in which there are no privileges; but he includes under privileges any aristocratic distinction. To him, therefore, the expression merely implies a monarchy in which there are democratic but no aristocratic organisms, i. e. an incomplete state in which the aristocratic elements are disregarded or suppressed. Compare below, Chapter XVII, on Constitutional Monarchy.

CHAPTER III.

LATER DEVELOPMENTS OF ARISTOTLE'S THEORY.

MONTESQUIEU, while following in essentials the division of Aristotle, made a distinct scientific advance in seeking for each of the three forms—monarchy, aristocracy, and democracy—a spiritual or moral principle, apart from the number of the ruling power. Whether he succeeded is another matter. In his view virtue is the principle of democracy, moderation of aristocracy, honour of monarchy, and fear of despotism. He thus made despotism a fourth kind of State, but it is better treated by Aristotle as a perversion of the normal polity. Montesquieu.

Schleiermacher[1] made a notable attempt to classify the various States according to different stages in the development of political consciousness. A State originates when the people acquire the consciousness of the 'necessary distinction (*Gegensatz*) between the government and the subject.' The first step is when a small people or tribe acquires this consciousness, and the new sentiment usually seizes 'equally upon the whole mass which is ripe for political life.' Then the sense of this distinction developes among all; they unite to form the government, and then separate again to become subjects. This is democracy, in which the opposition between public spirit and private Schleiermacher.

[1] Schleiermacher, *Ueber die Begriffe der verschiedenen Statsformen*, in the *Abhandlungen der Berliner Academie*, 1814.

interests is only slightly apparent. Or it may happen that, although the whole mass is ripe for political life, the impulse to form a State may affect it unequally: the political consciousness may develope first in an individual or a few. This creates inequality, which leads either to monarchy or aristocracy. In this stage, while the State is still small, the three forms are very similar, and are readily interchanged; but the natural inclination is always towards democracy, because the masses speedily overtake the individual or the few who were the first to acquire political consciousness.

In the second stage, which unites several of these small tribes, one exercises rule over others. This form of State is essentially aristocratic, as in the earlier stage it is essentially democratic. It cannot be democratic, because the majority of the tribes are subject to the ruling one, and therefore unequal. Externally it may assume the form of monarchy, but the king must belong to the ruling tribe, and is therefore only an aristocratic king.

The third and final stage, to which the latter is an intermediate step, is reached when a great people becomes fully conscious of national unity. The democratic character of the first stage could not fully develope the political distinction of government and subjects, nor could it reach the dimensions of a great nation. In the aristocracy of the second stage the ruling tribe had always its separate interests, and national unity was not the principle of the State. It is in the third stage that true Monarchy is fully developed, and the monarch represents the unity of the State, and government in its full power.

This view of Schleiermacher gives an intellectual basis to the three recognised forms of States, and connects them with the stages in the development of the political idea. Democracy appears as the lowest, and monarchy as the highest, stage. Although no new principle of division is introduced, yet a deeper insight is obtained into the spirit of the different forms.

But the course of history by no means corresponds with this logical development of Schleiermacher; in fact, the historical order is often the reverse—monarchy, aristocracy, and democracy. This is really the more natural order, because the active political consciousness is usually developed first in the upper classes of society, who live under more favourable conditions, and then is gradually extended to wider and lower circles.

CHAPTER IV.

THE PRINCIPLE OF THE FOUR FUNDAMENTAL FORMS OF THE STATE.

Four forms of State.

THE different forms of State are specifically divided, as Aristotle recognised, by the different conceptions of the distinction between government and subjects, especially by the quality (not the quantity) of the ruler (*Herrscher*).

1. The first form is Ideocracy, of which the highest type is Theocracy. Here the people regard their ruler as a superhuman being, who is raised above them by nature: God Himself is regarded as the true governor of the State.

2. In direct opposition to Ideocracy is Democracy. In the former the people are subjected to an external power outside and above themselves; in the latter the people govern themselves, i. e. collectively they form the government, but as individuals they are subjects.

3. In Aristocracy the distinction between government and subject is human, and within the limits of the nation: an upper class or tribe becomes the government, while the other classes and tribes are subjects. But while the latter have nothing to do with the government, the individual members of the ruling class are also subjects.

4. In Monarchy the distinction between government and subjects is complete, but it is again human. The government is concentrated in an individual, who is merely a ruler, and not at the same time a subject, but who belongs altogether to the State, and personifies the unity of the nation.

Their original type.

In each of these four fundamental forms an original type (*Urtypus*) is reflected:—

Theocracy represents the rule of God over the world, but a rule which is exerted directly, and in a way harshly and despotically.

Monarchy glorifies the unity of humanity in 'Man' as an individual: the ruler represents the collective State, the national unity is personified in its prince.

Democracy expresses the idea of the community of the nation, or of all individuals, and presents to us the State as a parish or commune (*Gemeinde*).

Aristocracy embodies the distinction between the noble and the lower elements of the nation, and gives the rule to the former. Its type is the nobility of higher race and quality, just as the commune is the type of Democracy.

Consideration of these forms.

From one point of view Theocracy and Monarchy stand in contrast to Aristocracy and Democracy. In the two former, the supreme power and majesty of government are so concentrated that the ruler is not also a subject, and that he represents no private interests, but only the interest of the State. In Theocracy, this elevation of the government is divine, and therefore *absolute*; in Monarchy it is human, and therefore *relative*. On the other hand, in Aristocracy and Democracy the distinction between government and subject is not so clearly marked: the same men at one moment rule and at another obey; they have both public and private interests. Hence it is that both are often classed under the common name of Republic. In Democracy this mixture of functions extends to the whole people: in Aristocracy it is limited to the ruling class. The latter, in relation to the other members of the nation, are merely rulers, but among themselves they are usually organised democratically, and thus both govern and are governed at the same time. Thus Aristocracy appears to be an intermediate stage between Democracy and Monarchy.

But, from another point of view, it is Monarchy and Aristocracy which are connected, and stand in contrast to the other two forms. In them the distinction between government and subject is humanly organised in such a way

that the rulers feel and know themselves to be independent; they are so regarded by the people; they govern in their own name and by independent right, though of course this is more completely the case in monarchy than in aristocracy. On the other hand, whether God or the people be regarded as ruler, their authority must be exercised by some intermediate persons, either priests or magistrates. These latter belong personally to the class of subjects, and they exercise only delegated authority as the servants of God or of the people. They cannot therefore be regarded as real rulers; they only administer the government for the real rulers, who are unable to act in person. They are constantly forced to refer to a superior power, which itself rules them, and which confers upon them an authority that they do not possess in themselves.

The distinction of States according to the forms of government is the foundation of constitutional law, and belongs to the domain of public law (*Statsrecht*). The same distinction is to be found in the tendencies of their political life, even in opposition to the form of their constitution. A State may be ruled in a spirit tending to theocracy (*theokratisirender Geist*), although it recognises some human ruler, e. g. an ecclesiastical prince or a priestly caste. So too a State may tend to aristocracy, although its public law recognises no aristocracy, e. g. the English State, where the monarchical form is modified by an aristocratic spirit. There are also States tending to democracy, though they are not democracies, e. g. Norway; and others tending to monarchy which have no real monarch, e. g. the French Republic.

Note.—F. Rohmer (*Lehre von den politischen Parteien*, § 219 sq.) divides States according to the four ages of human life, and in making this division he regards, not the form of the State, but its political spirit, i. e. its party-character. His four divisions are:—

Idolstat,	in which	the political	spirit is	*Radical.*
Individualstat	,,	,,	,,	*Liberal.*
Rassestat (race-state)	,,	,,	,,	*Conservative.*
Formenstat	,,	,,	,,	*Absolutist.*

A monarchy, for example, may pass through all these phases of the

political spirit in order. R. v. Mohl's objection (*Statswissenschaft*, I. p. 262), that a nation can be neither young nor old because children and old men live in it side by side, rests upon a misconception of the theory which he opposes. The ancients perceived clearly that nations, as organic units, pass through successive ages analogous to the youth and age of individuals, and Savigny has made the idea familiar to the legal circles of Germany. But in addition to this succession of periods in a nation's history, one must also consider that a nation has an innate character of its own. Just as some individuals are by nature childlike or even childish, and remain so in the prime of life, while others have an elderly and staid character even in youth, so there are nations which are childish and elderly by nature. This is most evident in the great race-divisions. The Negroes are children several thousand years old, the Red Indians have for centuries displayed the characteristics of age. In Europe, the continent of manly nations, the Spaniards—quite apart from the period they have reached—represent the elderly, as the Germans the youthful, spirit. Whether young or old, and whether this youth or age is due to natural character or to the period of its history, the people transfer their spirit to the State in which they live. The manly forms of constitutional monarchy become a simple farce among the childish people of Haiti.

CHAPTER V.

THE PRINCIPLE OF THE SECONDARY FORMS OF THE STATE.

Division of States according to the rights of the subjects.

THE quality of the head of the State determines the form of the whole body. But it is necessary to consider in the second place the rights of the subjects, in order to fully determine the legal character of the constitution, and to complete the Aristotelian division.

As in considering the government one looks at the ruling organ, so in considering the subjects, i. e. the nation in its narrow sense, one looks at their control over the government and their share in legislation.

By following this method of classification we arrive at the following three secondary forms of States.

Unfree;

1. The subjects are treated merely as a passive mass, bound to unconditional obedience to the governing power. They have no right of control nor any share in legislation. Such a State is absolutely governed, and we may call it the unfree form. And it is not only unfree when it is exposed to the arbitrary caprice of a despot (Despotism), but in a political sense it is equally unfree when the ruler recognises the restraints of law and protects personal property and freedom (Absolute Government).

Half-free;

2. Some of the subjects, i. e. the upper classes, have the right of control and a share in public business, and thus limit the government. But the rest of the people, and especially the lower classes, have no political rights or

freedom. These States are half free; and may be illustrated by the mediæval States which were organised upon feudal principles or upon class privileges (*Lehens- und Ständestaten*).

3. All classes have political rights. The whole country or nation controls the government and takes part in legislation. These are free States, or republics in the widest sense of the word (or national States, *Volksstaten*). Free States.

This control or share in the government is exercised either (*a*) directly through the assembly of citizens, as was usual in ancient times (Ancient Republics), or (*b*) indirectly through committees and representatives, the system of the present day (Modern Representative States).

If we now bring together the fundamental and the secondary divisions, we obtain the following results:— Application of this division to the four fundamental forms.

1. Theocracy tends, by its principle, to the class of unfree States. But it is not necessarily despotic, for the ruling God, or the priesthood inspired by Him, may recognise and respect a law of the community. It may therefore approach to the second or to the third class, so far as the exercise of the divine rule is influenced by the co-operation of aristocratic classes or of a national assembly. In this sense the Jewish theocracy was republican.

2. Aristocracy gravitates towards the second class, the half-free States. But it may be regarded as unfree when the *demos* is wholly without political rights; or it may rise to be a free national State (*Volksstat*) if the *demos* is allowed, as in Rome, to have a real representation.

3. Democracy naturally belongs to the third class, the free States. But it may become a despotism to the minority, or an absolute government as regards individual citizens: and again, in relation to a servile class (e.g. the slaves and helots of antiquity or the negroes in America), it may appear as a half-free State.

4. Monarchy, the most various of all kinds of State, forms numerous combinations with these three classes. The despotisms of the East and the absolute governments of the West are obviously unfree; the kingdoms and principalities

of the middle ages, restricted by the clergy and the secular nobles, were half-free; the Roman kingdom as organised by Servius Tullius, the kingdom of the old Franks and the modern Norwegians, all of which have given to the national assembly a distinct share in the government, may serve as examples of free monarchies: and finally, the constitutional monarchy of the present day is the nearest approach which monarchy has yet made to a free State with a representative constitution.

When Aristotle's division, which rightly starts from the summit, is thus completed by a consideration of the base, the chief objections to it are removed. It is no longer possible to maintain that it wants precision, or that it fails in explaining such points as the close connexion between modern representative democracy and constitutional monarchy, or the essential difference between absolute monarchy and mediæval monarchy limited by class privileges (*ständisch beschränkte Monarchie*).

Note.—This analysis of the secondary forms of States was suggested by the very interesting study by Georg Waitz of the difference of State forms (*Politik*, p. 107 sq.). Waitz gives the name of *Republic* to a state in which the government rests either with the nation or its delegated representatives. On the other hand a Kingdom exists when an individual governs by his own power and in complete independence of the people. In his view the Aristotelian division is secondary, and his own is primary. According to him the Roman Empire becomes a Republic and the German Empire a Kingdom: the old Roman Patriciate is a Kingdom, the Napoleonic Empire a Republic. But this method brings confusion rather than order into the two divisions. The arrangement given above and based both upon the quality of the ruler and the rights of the subjects, is logically clear and necessary to complete the division of Aristotle. It also explains satisfactorily why it is that constitutional monarchy is more closely related to representative democracy than it is to absolute monarchy.

CHAPTER VI.

THEOCRACY OR IDEOCRACY.

THEOCRACY is a form of state which belongs to the infancy of the human race. The earliest political development took place in Asia and Northern Africa, and here the first states are theocratic. Theocracy natural in early times.

In the early youth of humanity the sense of dependence upon the divine being and upon the mysterious forces of nature was extremely vivid, and the influence of God or nature upon the life and education of men was more direct and powerful than it has since been. All ancient sagas and myths represent one or more gods as holding personal intercourse with mankind. Plato's account of the original condition of the Hellenic race agrees with the belief of all early peoples. He tells how Kronos, reflecting on the weakness and incapacity of the men of that time 'placed as kings and princes not men but demons (δαίμονες), beings of superior and divine origin.' Plato was himself in favour of this theocratic conception, and in his theory of the State he employs artifices to allure men back to the old belief in divine rule[a].

In this belief in gods and demons[1] as the true heads of the State was inevitably involved the preponderant influence It involves the rule of priests.

[a] [See Plato, *Laws*, iv. 713.]

[1] An extraordinary *demonocratic* state of the present day is described by A. H. Layard (*Nineveh and its Remains*, vol. i. pp. 269, &c). The Jezidi, a tribe of the mountains of Mesopotamia, are subject to a priestly ruler, the great Scheik, and worship Satan, who they believe will one day be restored to his high estate in the celestial hierarchy.

of the priests, the chosen mortals who were vowed to the service of the gods and who alone could understand their will and their utterances. Among such peoples therefore the priests have supreme rank. In some the priests rule directly in the name of one or more gods. In others kings are at the head of the State, but they rule only as representatives and organs of the gods, and either are themselves high-priests or are under the influence and control of the priesthood. The former may be called pure, the latter limited, Priest-states (*reine* and *gebrochene Priesterstaten*). The latter form the stage of transition from Theocracy to Monarchy.

Meroë. A pure Priest-state was that of the Ethiopians in Meroë. The priestly caste was supreme: from their own body they nominated some of the best, and of these God chose one in a solemn ceremony: the people immediately did obeisance to the divine nominee and revered in him the representative of God. But the power of this chief was restricted on every side by the divine laws and by the continued manifestations of God's will in the oracles communicated through the priests. A strict ceremonial ordered all his movements and left no room for free decision; everywhere the priests accompanied him and co-operated with him. Even his life was not secure: if he displeased God, this was revealed to the priests, they announced to him the message of divine wrath, and nothing remained for him but to appease the offended deity by a voluntary death[2].

Egypt. Of the mixed priest-state we see an example in Egypt. According to popular tradition the gods originally ruled directly. Some centuries later human kings are found, but they were regarded either as gods or as the descendants of gods, and their power was limited by the divine law, by a strict etiquette, and by the influence of the supreme priestly caste. The divine precepts regulated such minute details that the king could not even choose his own food, but his

[2] Diodorus Sic. *Hist.* iii. 5, 6. Cp. Leo, *Weltgeschichte*, i. p. 79.

frugal meals were fixed for all time[3]. It is true that the priests did not dare to bring him to trial during his lifetime, but after his death they formed a solemn public tribunal and issued a judgment on which depended his honour among posterity, the reception of his soul in the lower world, and even his resurrection. The Egyptians believed so strongly in the life after death that they took the greatest pains to preserve the body from corruption, to adorn it with extravagance, and to build for its reception palaces which suggested all the needs of life. It is obvious therefore what hopes and fears must have been based on this judgment and what tremendous power it placed in the hands of the priests.

The old Indian state resembled the Egyptian, and was also mainly Ideocratic. In the order of castes the king stood below the Brahmins. A Brahmin would consider himself and his daughter degraded if he gave her in marriage to the king. Yet the royal dignity was so highly esteemed that a certain divinity was considered to pertain to it. According to the laws of Manu the king's body is pure and holy, being composed of elements which have their origin in the eight divine guardians of the world. 'As the sun blinds he the eyes and the heart, and no one on earth dare look him in the face. God has created him for the preservation of all beings. No one may scorn him even in infancy and say "he is a simple mortal," for a great divine force dwells within him[4].' India.

The Indian king was also surrounded by priests. He must be consecrated by them on his accession. The seven or eight ministers, whose advice he must take on all matters, were mostly Brahmins. He could take no important step without first consulting a council of conscience composed of Brahmins. He was bound by the strictest ceremonial, and

[3] Diodorus Sic. *Hist.* i. 71, 72. Cp. Duncker, *History of Antiquity* (trans. by Abbott), i. p. 188.

[4] Manava—Dharma—Sastra. *Laws of Manu* (trans. by Sir W. Jones), v. 96, 97; vii. 3-8.

the laws of Manu reminded him in the gravest terms of his responsibility, though they did not define it very precisely. 'The foolish monarch who oppresses his subjects with injustice will speedily lose both kingdom and life, he and his whole family[5].'

The Indian state, being of Aryan origin, was freer than the preceding: the royal dignity and power were more fully developed than in the more sombre states of Meroë and Egypt. But in all we find a rigid system of caste and great privileges in the hands of the priests, who had absolute mastery over the intellectual life of the nation, and were richly endowed with earthly goods. In Egypt they held a third of the land[6], and according to the Indian law 'a king, even though he be dying of want, may not levy a tax on a Brahmin well-read in the sacred books, nor allow such a Brahmin to starve[7].' The lower classes were oppressed and despised, and there was no prospect of individual advancement to brighten their hard lot. The Egyptian peasants were simple serfs who cultivated the property of the priests, the kings, or the warriors. The shepherds and artisans were bound by birth to their occupation, were subject to arbitrary taxation, and had no active part in political institutions. Compulsory labour of all kinds was common in these countries.

For centuries this theocratic character has prevailed in the states of Asia, and it is still visible in the eastern empires. It is true that as the secular ruler has increased his power by the conquest of vast territories, the authority of the priesthood has been obscured and driven into the background. But the rulers themselves have become gods, and thus the theocratic character of the state has been maintained, though not in the old form. First the ruler was God in person, and kings and priests were His instruments; then the rule passed more and more into the hands of the priesthood, headed by a priestly, or later by a military, king;

[5] *Laws of Manu*, vii. 54, etc.
[6] Diodorus Sic. i. 73.
[7] *Laws of Manu*, vii. 133.

finally the king himself was venerated as a god, and a superhuman despotism arose. This was the case in the Persian empire, as in the later rule of Mohammedan Sultans and the Emperors of China.

Vitaçpa, the king of Iran about the year 1000 B. C., in whose time Zarathustra (Zoroaster, Serduscht) appeared as a prophet, called himself *priest-king*, and in the Persian sacred books (the Zend-Avesta) the king is placed, not in the caste of warriors as in India, but in that of priests (the 'learned in law and in god'[8]). The whole political system was religious, there was no distinction between law and morality, the invisible world of good and evil spirits was regarded as in constant connection with the visible world of humanity. But when kings arose in Persia outside the priestly class, the state became more and more a despotism, and the influence of the Magi, though still considerable, was far less than in earlier times. The king became as all-powerful as the god who had raised him to rule; his court was the earthly copy of the heavenly court of Ahuramasda, the good spirit. Divine honours were paid to him: he sat upon his lofty throne of gold, adorned with purple robe, tiara on his head, the golden staff in his hand, the sword by his side, 'glittering like the sun in the shining firmament,' and before him foreign envoys prostrated themselves in the dust, like slaves before their lord, or worshippers before their god. Gifts were offered to him like sacrifices to a god, and when he died he was carried to the gorgeous mausoleum in Persepolis, there to continue the life of the blest. He was honoured with a solemn ceremonial and symbolic rites[9]. In reality this ceremonial enclosed him like a golden net, deprived him of all freedom of will, and mocked his boasted omnipotence. Persia.

Nevertheless, this change from priestly rule to despotism

[8] Vuller, *Fragmente über die Religion des Zoroaster* (Bonn, 1831), pp. 33, 69. Cp. Spiegel, *Avesta* (Leipzig, 1852–63), vol. iii; also Duncker, *History of Antiquity*, v. p. 132.

[9] See Leo, *Weltgesch.* i. 120 sq.; Duncker, vi. 389 seq.

marks a distinct step in advance. It overthrew the rigid rule of a revelation which the priests read in the stars and which was deemed divine, and it broke through the innumerable forms which were imposed upon the whole political life by the observance of fixed supernatural laws. A free human will, despotic though it was, began to express itself in public affairs, and could give attention to changes of political conditions and to the new needs of the people. Thus the iron system of caste was early broken up in Persia.

The Jewish Theocracy.

The most notable of ancient theocracies was that of the Jews in the Mosaic dispensation. It was based on the firm foundation of a pure religion, and of a vivid belief in a single God, the creator and preserver of the world.

Among the Jews the king was God himself, Jahvé or Jehovah. He was the immortal lord of a mortal but chosen people. He was both legislator and ruler. The whole system of law, which we call Mosaic, was regarded as the revelation of God, with whom Moses spoke in the solitude of the mountain-top, whose will he received with fear and trembling and announced to the people with loyal truth. Thunder and lightning manifested the presence of God upon Mount Sinai.

The whole people was elevated by His divine rule. In Egypt they had been despised and regarded as outcasts with whom intercourse was degrading. Now they were filled with the lofty thought that they were the nation chosen and preferred by God. Although they were divided into hereditary tribes, and had one special priestly tribe (that of Levi), yet all were descendants of Abraham, Isaac, and Jacob, they formed as it were a 'nation of priests.' Thus their ruling principle was not that of rigid caste distinctions but the brotherhood of the tribes.

The divine law was preserved in an Ark overlaid with gold, over which rose the golden mercy-seat, guarded by two cherubim and revered as the seat of divine revelation. The ark and the mercy-seat were both concealed behind a curtain in the Holy of Holies within the tabernacle which was God's

residence, and was carefully guarded by the priests. There the High Priest received the commands of Jehovah and announced them to the people. The High Priest, descended from Moses' brother Aaron, was the natural organ of the divine will, and also the representative of the people before their Lord. In exceptional and critical times Jehovah sent inspired individuals, or prophets, to restore His neglected authority, to awaken the conscience of kings or people, to punish backsliding, to urge repentance and amendment, and to reveal the future destiny of the nation. The judges who were placed at the head of the tribes to administer the law, did so in the name of Jehovah, 'for the judgment is God's.' Therefore they shall 'not respect persons in judgment, but shall hear the small as well as the great, and not be afraid of the face of man.' If any cause was too hard for them, they were to demand God's judgment through the Levites, and this judgment they must carry out or die [10].

The whole soil of the Promised Land was the property of Jehovah, and the various families only held it as tenants. In recognition of the divine ownership a tenth of the produce of land and flocks had to be given to the tabernacle for the maintenance of the priests. Every seventh year was a year of rest, even for the land which was not tilled, just as the seventh day of the week was a day of rest for men; and after seven times seven years came the year of jubilee, in which the original division of the soil was renewed, so that impoverished families recovered their lands, while those who had grown rich had to resign their surplus. A Jew could never be a slave; if poverty compelled him to sell himself he was treated as 'a hired servant and a sojourner,' and was released in the year of jubilee. A slave among the Jews was always of foreign blood [11].

When the Jews afterwards demanded a king, that they

[10] Deuteronomy i. 17, and xvii. 8, &c. Cp. Duncker, ii. 201 sq.
[11] Numbers xxv.; Deuteronomy iv. and v. Cp. Duncker, ii. 219.

might be 'like other nations,' Jehovah granted their wish through the mouth of their judge, Samuel, but He consoled the latter by saying, 'Hearken unto the voice of the people in all that they say unto thee: for they have not rejected thee, but they have rejected me, that I should not reign over them[12].' So the state passed from pure theocracy to monarchy, but the monarchy was always partly theocratic, and influenced by the religious character and mission of the Jewish people.

Theocracy in Europe

In Europe we find only isolated and feeble echoes of the old theocracy. Caligula appearing in public as Jupiter with golden beard and lightning; Heliogabalus sacrificing as a priest to the sun; Gessler in the Swiss legend bidding the free mountaineers to revere the emperor's hat: all these are only caricatures of a form of state which had perished, and which had no claim to permanence. But there are a few relics of theocracy in the Roman empire, e.g., in the statues and temples to living emperors, the name of *Divus* given to them after death, and the ceremonial of the later Byzantine court.

In the middle ages the influence of the clergy, always devoted to the theory of theocracy, gave to the Christian states a theocratic colouring. This is apparent in secular as well as in ecclesiastical principalities, though naturally more so in the latter. Thus the Emperor has to receive priestly consecration[b]. But however fond men were in the middle ages of deriving all right and power from God, they never regarded their rulers as anything but men, and they imposed manifold human restraints upon their power.

The only real theocracy in Europe is the Christian Church, the hierarchy of the clergy. Secular princes and govern-

[12] 1 Samuel viii. 7.

[b] [The prince chosen by the seven Electors assumed the title of King of the Romans: he was not formally Emperor until his coronation by the Pope, which was often delayed for some time. Charles V was the last Emperor who received this papal coronation: his successors assumed the imperial title on election. The Holy Roman Empire ended with the abdication of Francis II in 1806.]

ments are always being reminded of their human origin by the Church. The fundamental forms of the mediæval state are rather aristocracy or monarchy than theocracy.

The Mohammedans.

On the other hand, the Mohammedan states which arose in the middle ages must be regarded as theocratic in character. It is true that the Mohammedans did not, like the Jews, believe in a direct and regular government by God; Mohammed did not restore the theocracy of Moses. But the Koran teaches that God confers rule upon whom He will, and treats the human head of the State as the representative vicegerent and vassal of God. In the Caliphate, the ideal of the political system of Islam, are combined the functions of high-priest and of king. The Caliph is Emperor and Pope in one. There is no valid distinction between religion and law, theology and jurisprudence; theologians are also lawyers. Islam has much more in common with theocracy than Christendom has[13].

The modern world is obviously hostile to the theocratic form of State, and to everything that suggests it: witness the disappearance of ecclesiastical principalities, and the abolition of the Pope's temporal power in 1870[14].

General characteristics of Theocracy.

The following are the ordinary characteristics of theocratic States:—

1. There is a close intermixture of religion and law, of ecclesiastical and political institutions and maxims, with a preponderance in favour of the religious elements. The prospect of the life after death so dominates over the earthly life that it obstructs its free development.

2. The principle of authority is exalted to a superhuman height, and becomes by its nature absolute. All civil and political life is dependent upon it. The subjects do not

[13] For other states with a theocratic tendency, see Bluntschli, article *Ideokratie* in the *Deutsches Statswörterbuch*, v; also v. Mohl, *Encyclopädie der Statswissenschaft*, § 41.

[14] Even the constitution of Montenegro, which a few years ago possessed a priestly-military chief in the *Vladika*, has approximated to the other states of Europe by separating the priestly dignity from the sovereignty.

stand in any human relation to their chief, they are not connected with him by common patriotism, common nationality, or common race. The ruler is raised to an inaccessible height and becomes omnipotent.

3. So far as this divine authority is based upon a revelation made long ago and no longer continued, as among the Jews upon the Mosaic dispensation, and among the Mohammedans upon the Koran, it founds a firm but unchangeable organisation.

If, on the other hand, the deity is supposed to issue new decrees to suit changing circumstances and momentary needs, then there are only two ways in which its human representatives can learn the divine will. Either there are definite external forms for its manifestation, or it must be known by internal inspiration. The first method was employed by the Chaldeans who read the stars, by the Jews who watched the aspect of the rising sun, by the Roman augurs and haruspices who scrutinised the entrails of the sacrifices and the flight of birds, by the Greeks who questioned the oracles, and by the Germans who cast the dice. It leads always to superstition and fraud. A belief in inspiration, on the other hand, leads to a passive surrender of the intellectual powers that were given for active use, and to a passionate confidence in the expected impulse from above.

Thus in a theocracy the human organs which are indispensable for deciding matters of legislation and government, are very imperfectly developed and can never be relied upon.

4. The secular magistrates are subordinate to the priests, who regard themselves as nearer to God. If they rule directly, the State is obviously a priest-state, while if a secular sovereignty co-exists with them, their supremacy still remains beneath the surface, and it is a latent priest-state.

In every priesthood there is something effeminate, so that in a priest-state the manly qualities are subordinate to the

feminine, and self-confidence and freedom never reach full development. Under clerical rule laymen must always be obstructed and kept in the background.

5. There is a harsh criminal jurisdiction and cruel punishments[15]. Human justice represents the wrath of God, the free movement of the individual intellect is condemned as impious, and a slight offence is treated as an insult to the divine majesty.

6. The education of the people falls wholly into the hands of the priests. Schools become instruments for the attainment of clerical objects. Science, art, and all kinds of skill are only encouraged so far as they serve these objects; as a rule they are distrusted and neglected, and if they seem to threaten any danger to religious authority they are suppressed and persecuted. They are regarded, not as having any value in themselves, not as free creations of the human intellect, but merely as slaves of the Church.

[15] See Duncker's remarks in the *History of Antiquity*, iv. 398.

CHAPTER VII.

THE CHIEF KINDS OF MONARCHY.

MONARCHY is the most widely recognised form of State in the world. It is found in all continents, in Asia and Europe it is almost universal, and it has been so from the beginning of history to the present day. But monarchies differ so much both in idea and in form that it is difficult to classify their main divisions.

Despotism.

1. The transition from theocracy to human kingship forms Despotism, of the kind which mainly prevailed in Asia. The distinguishing mark of Despotism is the concentration of all rights in the monarch, so that no one has any right apart from or in opposition to him. He may recognise the restrictions of religious or moral duty, or of his responsibility to God, but his power is not limited by the rights of his subjects, who are mere slaves and dependent upon his arbitrary grace and favour.

Such a despotism must seek some justification for itself by appealing to the divine omnipotence. The despot must be revered as the vicegerent of God, his power is unlimited because it comes from above. Thus despotism is closely allied to theocracy, and shares its defects, in spite of the human character of the ruler. The Mohammedan States of the middle ages had this tendency towards despotism, and it is only in our own day that they have approximated more nearly to the human monarchy of the rest of Europe.

Civilised Monarchy.

2. Despotism may be regarded as the barbarous form of monarchy. The peoples of Aryan origin rejected it long ago as degrading, and recognised the rights of classes and

individuals apart from those of kings and princes. The subjects have regarded themselves as freemen, not as slaves. Whenever the monarchical power has been strained so as to verge upon despotism, they have regarded it as an injustice, and have seized the first opportunity to compel the ruler to respect their rights. Civilised monarchy, therefore, is always conditioned and limited by a judicial organisation to secure common rights. The position and power of the monarch is raised rather than lowered by this, for it is a nobler task to guide the political forces of a free people, than to direct the stupid obedience of a servile mass. The more a State can combine the unity and energy of the whole with the freest development of the members, the more perfect is its organisation. This is possible in a civilised monarchy, in a despotism it is impossible.

The human intellect has made many attempts in different periods and among different nations to find the exact measure of the limitations that should be imposed upon monarchy.

Patriarchal kingship.

One of the earliest forms is the Kingship of the Family, or Patriarchy (*Geschlechtskönigthum, Patriarchie*). The king is regarded as the head of the chief family, as the elder and father of the race. This early and artless institution, which is found in the *Vispati* of the Indian races and the *Kuning* of the German tribes, is regulated by the relations and spirit of the family.

Feudal Monarchy.

Equally bound up with the institutions of personal property and security is the patrimonial principality of the middle ages, whether in the form of the feudal State (*Lehensstat*) or of a simple territorial lordship (*Landesherrschaft, dominium terrae*). This, too, is influenced by family rights and dynastic conceptions, but it also confounds the State with the ownership of the soil, and treats the function of the ruler as a right over property.

These two forms, in which political consciousness is as yet undeveloped, may be termed immature phases of monarchy.

Military and Judicial Principalities.

3. When the political consciousness is only partially awakened, and is directed only to a single function of the ruling power, we have one-sided (*einseitige*) forms of monarchy. Such are military principalities in which the military function is primarily regarded, or judicial principalities (*Gerichtsherrschaft*) in which the judge is the ruler. The former is more absolute and energetic, the latter more limited and peaceful.

Absolute Monarchy.

4. When the political consciousness is excessively developed in the prince, the central power obtains decisive preponderance in his hands, and the people have no political rights. This absolute monarchy is the civilised form corresponding to the barbarous form of despotism, but it differs from it in that the monarch recognises a judicial organisation, and is willing, at any rate as a rule, to respect it. In the Roman Empire this power was more absolute than in modern states, in which it has been restricted even in the middle ages by Christianity and by the development of freedom.

Limited Monarchy.

5. Limited monarchy is at once more noble and better proportioned. It retains the unity and supremacy of the central power, and seeks to combine with these the liberty of all classes and individuals of the nation. In the middle ages such a monarchy was restricted by the privileges of nobles or of estates, as in modern times by representative and constitutional forms.

Kingship and Empire.

6. In treating of monarchy it is necessary to notice the distinction between Kingship and Empire (*Kaiserthum*), a distinction which is found in all stages of development, in the rude despotisms of Asia, and in the civilised states of Europe.

The idea of Kingship refers to the nation, that of Empire to humanity. Kingship is the supreme institution of the single national State, Empire is the crown of the world. The emperor is raised above kings as humanity above the separate nations. The rulers of Oriental empires are always kings of kings. Julius Cæsar conceived the thought of the

universal rule of Rome, and history has given his name to this lofty conception of the State. But this idea can never be fully realised until the world has advanced to a universal organisation of humanity. Till that time all attempts to restore the Empire must be, like those in the past, partial and imperfect[1].

[1] On the idea and the history of the Empire, see the article on *Kaiserthum* in the *Deutsches Statswörterbuch*.

CHAPTER VIII.

I. Family Kingship among the Greeks and Germans.

Characteristics of early Greek and German Monarchy.

The conception of kingship among the tribes and states of early Greece and Germany is remarkably similar, while that which prevailed among the ancient Romans, who come between them in point of time, differed in important respects from both.

The kingship of the Greeks and Germans is the transition from the ideocratic form of single rule in the east to a human and political institution. The kings were believed by the people to derive their descent from the gods, from Zeus or Woden[1], but they were not themselves regarded as gods, and they were subject to human restraints.

Therefore, the honours paid to the king were greater than his power. He represented the nation in its relations with

[1] Hence the expressions of Homer, ἐκ δὲ Διὸς βασιλῆες, διογενεῖς, διοτρεφεῖς. Cp. *Iliad*, ii. 204–6 :—

Οὐκ ἀγαθὸν πολυκοιρανίη· εἷς κοίρανος ἔστω,
Εἷς βασιλεύς, ᾧ ἔδωκε Κρόνου παῖς ἀγκυλομήτεω
Σκῆπτρόν τ' ἠδὲ θέμιστας, ἵνα σφίσι βασιλεύῃ.

Cp. Hermann, *Griech. Statsalterth.* § 56; also Sophocles, Philoct. 138–140 :—

τέχνα γὰρ τέχνας ἑτέρας προβύχει
καὶ γνώμα παρ' ὅτῳ τὸ θεῖον
Διὸς σκῆπτρον ἀνάσσεται.

Cp. the praise of kingship in the Indian epic, *Rama*, in Holtzmann, *Indische Sagen*, ii. p. 316 :—

'As for the body the eye always
To all sides carefully looks,
So for the realm the prince of men,
Root of virtue and law.

the gods, and officiated as intermediary between the two in sacrifice and prayer[2], when these were not performed by a special priesthood. Thus in Athens, after the monarchy had been abolished, the sacrificing archon retained the title of king.

Their pecuniary estimation was much higher than that of the other members of the State. The *wergild* of the king in Germany was usually many times as great as that of the noble. They were also very superior to their subjects in wealth, the greater part of the land was their domain, and they received the largest share of conquered territory[3]. Their residence, or palace, was larger and more richly adorned than the other houses[4]. Their treasuries, or hoards, were rich in ornaments and precious stones. They had external ensigns of their royal rank, the sceptre[5], the throne, and the announcement of their approach by heralds. Their dress was always conspicuously brilliant. The ancient kings

> Wrapped in blind darkness
> Waste and confused is the world
> Unless the king keeps order
> And shows what is just and unjust.'

According to Jornandes, c. 14, the Amals spring from the race of the Asa. Hengist and Horsa are believed to be descended from Woden. On the gradual development and extension of monarchy among the German tribes, even among those which originally had no kings, see Dahn, *Die Könige der Germanen* (München, 1861–71), and Gierke, *Deutsches Genossenschaftsrecht*, i p. 48, &c.

[2] Aristot. *Pol.* iii. 14. § 12, 1285 b. 10. In the Scandinavian countries this characteristic of the kings is more prominent than in the known history of any German state. Comp. Grimm, *Deutsche Rechtsalt.* p. 243. King Hakon of Norway, though inclined to Christianity, was compelled by the still heathen peasants to sacrifice in ancient fashion at the *Thing*, to drink from the sacred goblet, and to eat horseflesh. Konrad Maurer, *Die Bekehrung des norwegischen Stammes zum Christenthum*, i. p. 160 ff.

[3] Tacitus, *Germ.* c. 14: 'Materia munificentiæ per bella et raptus'; c. 26: 'Agros inter se secundum dignationem partiuntur.' In spite of incessant alienations, the kings and princes of Germany retained extensive territories throughout the middle ages.

[4] Homer, *Od.* iv. 45–46:—

> Ὡς τε γὰρ ἠελίου αἴγλη πέλεν ἠὲ σελήνης
> Δῶμα κατ' ὑψερεφὲς Μενελάου κυδαλίμοιο.

Comp. vi. 301, and the '*Hallen*' of the German princes.

[5] Homer, *Il.* ii. 100–8. Cp. Grimm, *Rechtsalt.* p. 241.

of India and China always appeared in a long robe worked in gold thread, and with a yellow umbrella[6].

The existence of royal families and their supposed descent from the gods prove that ancient monarchy was hereditary. Yet there were no fixed rules of succession. Among the Greeks regard was paid to personal courage and capacity. Women and children were almost always excluded, and as acknowledgment by the nobles and people was necessary, it sometimes happened that the hereditary succession was broken through[7]. Among the Germans the practice prevailed of election by the nobles and recognition by the people, but as a rule the succession was hereditary, and children obtained the crown more often than in Greece. There was nothing, however, to prevent the free community from preferring a more distant member of the royal family if he seemed more likely to be a capable ruler[8].

Limits to royal power.

The political power of these kings was considerable, but was subject to important limitations.

1. The king presided over and directed both the council of princes and the national assembly[9]. But in both, according to Tacitus, his authority depended rather on his persuasive influence than on his right of command[10].

[6] Grimm, *Rechtsalt.* p. 239; Thierry, *Récits des Temps Mérovingiens*, ii. 82; *Rama*, l. 782 (in Holtzmann, *Indische Sagen*, vol. ii).

[7] Comp. the history of Œdipus. Among the Indians we find a similar combination of hereditary right (by primogeniture) with election by the princes; v. Holtzmann, *Indische Sagen*, ii. 184.

[8] Tacitus, *Germania*, c. 7: 'reges ex nobilitate sumunt.' The German name for king, *Chuning* or *Kun-ing*, comes from *chun* or *chuni*, family. Childebert II became king of Austrasia at the age of five (Thierry, *Temps Méroving.* ii. 43). Instances of departure from hereditary succession are more common in the history of the Visigoths and Lombards. F. Dahn (*Die Könige der Germanen*, l. 32) lays more stress upon hereditary right, Thudichum (*Der altdeutsche Staat*, p. 60) upon election, but both recognise the combination of the two principles. A similar combination is to be found among the Indians; v. Holtzmann, *Indische Sagen*, ii. 184 (*Rama*, l. 22).

[9] The βουλή or γέροντες of the Greek kings corresponds to the *concilium principum* which Tacitus describes among the Germans (*Germ.* cc. 11, 12).

[10] Tac. *Germ.* c. 11: 'auctoritas suadendi potius quam jubendi.'

2. He was the chief judge, and though he did not pronounce the decision, he defended and maintained the law[11]. His power was not at all arbitrary, as he was bound to respect the decision of the court.

3. He was the head of the military organisation, and usually the leader of the army[12]. It was by war that his power increased[13]. But the Germans, just because they respected hereditary right more than the Greeks, were often compelled by the minority of the king to appoint *heretogan* (*duces*, dukes) to take the actual command, though the king was still regarded as the supreme head of the national force (*Heerbann*).

4. Real government was very little developed among the early Greeks and Romans, though its germs were concealed under the attributes of the king which have just been enumerated.

5. In both races the king's existence and rights were hemmed in by the rights of gods and men. The Greeks laid special stress upon the obligation of their kings to respect the divine ordinances and the national laws and customs, and they pointed to this as distinguishing them from oriental despots[14]. The king was within the judicial organisation, not above it; he was not outside the nation, but at its head. The German kings were still more limited by the rights of the whole body of freemen[15].

But there was one peculiarity of the German kingship The German *Comitatus.*

[11] Hence Homer calls the kings *διασκόλοι* (*Il.* i. 238) and *θεμιστοπόλοι*. The Indian name for king, *râg*, comes from *rag* (right, *richten*), as *rex* from *regere*. Comp. Lassen, *Ind. Alterth.* i. 808; also Holtzmann, *Ind. Sagen*, ii. 184 (*Rama*, l. 23):—

'The burden of justice
which the King's majesty bears.'

[12] Arist. *Pol.* iii. 14. § 12, 1285 b. 9: *κύριοι δ' ἦσαν τῆς τε κατὰ πόλεμον ἡγεμονίας*. In many of the German tribes a successful *heretoga* founded a royal dynasty.

[13] Cp. Caesar, *de B. G.* vi. 23.

[14] Dionys. Hal. v. 74; Arist. *Pol.* iii. 14. §§ 12 and 14. Cp. Sophocl. *Oed. Rex*, l. 850 sq.; *Antig.* l. 451, and *Oed. Col.* l. 1372 sq.

[15] Tac. *Germ.* c. 7, 'nec regibus infinita aut libera potestas;' and c. 11, 'penes plebem arbitrium.'

which led to a great increase in its power. This was the *comitatus*, a body of men bound by oath to personal fidelity, whose constant aim was to defend the king's honour and power against all opponents. This institution is the germ from which sprang the later feudal organisation, which was destined to break through and to a great extent to transform the old constitution.

CHAPTER IX.

II. National Monarchy in Ancient Rome.

In some points the kingship of ancient Rome seems closely akin to that of the Greeks and Germans, but in others it displays such important differences that we must regard it as a new and more developed form. In the very appointment of the kings there are two notable points of difference—hereditary succession is less prominent than nomination or election, and popular belief does not attribute divine descent to the kings. Conception of Roman Monarchy.

It is true that the founders of Rome were believed to have divine blood in their veins, and Romulus was placed among the gods after death. But from his time the gods exerted their influence in the choice of kings, and in all other matters, only by the signs of the auspices, by the invisible impulse of the soul, and by the irresistible might of destiny. Thus, though the idea of divine influence remained, the Roman kingship was purely human; the insight and will of the individual were more regarded than descent and the family[1].

The Roman king was chosen either by his predecessor or by the *interrex* with the help of the senate and the approval of the gods. The choice was for life only, so that no hereditary dynasty was created, and it depended more

[1] In the same way inheritance among the Romans was based not so much upon family relationship as upon the individual will of the testator, who was free to name his own heir.

upon individual character than upon descent. The elected king himself proposed the *lex curialis* by which the royal authority and the auspices were given to him[2], just as the *imperium* was conferred upon the magistrates of the subsequent republic. Thus the Roman kingship was from the first an individual magistracy.

This conception is obviously quite different from that of the Greeks and Germans. The character of the kingly power shows an equally important divergence. In many points it is similar: the king is the high-priest who sacrifices for the nation; he assembles and guides the Senate and the *Comitia*; he is the supreme judge, though in certain cases there is an appeal from him to the people; he is the rightful head and leader of the army; he is rich in lands and revenues[3].

Administrative power.

But his power is stronger and more complete than that of the Greek kings, though the latter are the hereditary descendants of the gods. The strong political sense of the Romans is obvious from the first in the extent of the administrative power which they confer upon their magistrates, in order that they may take energetic measures in defence of the public welfare. The *imperium* is distinctly Roman in origin, and it is this which distinguishes their kingship from the previous forms.

External ensigns.

The external ensigns of the Roman are quite as imposing as those of the Greek and German kings, but they also manifest their greater power. The fasces which the twelve lictors carry before them are not mere symbols, but real instruments of punishment for the disobedient. The *imperium* and the lictor's axe are always connected in fact and thought by the Romans[4].

[2] This is the so-called *lex regia*, which was renewed under the Empire. Ulpian, L. 1. *pr. de constit. Princip.*; Cicero, *de lege agrar.* ii. 11. Cp. Mommsen, *Römisches Statsrecht*, i. 588.

[3] Cp. Niebuhr, *Röm. Gesch.* i. 356; Rubino, *Untersuch. über röm. Verf.* i. Abschn. 2; Mommsen, *ibid.* ii. 9.

[4] Cic. *pro Flacco*, c. 8: 'Opifices et tabernarios atque illam omnem faecem civitatum, quid est negotii concitare in eum praesertim qui nuper *summo cum imperio* fuerit, summo autem amore esse propter *nomen ipsum imperii* non potuerit. Mirandum vero est homines eos, quibus

Legislative power.

The *imperium*, which was transferred to the king with the auspices, gave him the right both of issuing edicts and of laying down the principles of law. It must never be forgotten that the Roman State was founded by a king, and that it was his power which passed by tradition to his successors. Permanent laws needed the consent of the Senate, and from the time of Servius Tullius[5] the sanction of the people (*jussu populi*), but at the same time the royal will was essential and usually decisive. The king alone could propose a law, and he could prevent any law from being discussed or voted upon[6]. Besides these laws the king could in his edict lay down, without the counsel and consent of any assembly, the legal maxims which he intended to follow. This *jus edicendi* was unquestionably a right of the kings, though seldom exercised by them: it was not created for the later magistrates, but was handed on to them from their predecessors.

Judicial power.

Thus the judicial power of the Roman kings was far greater than that of the German. Both presided, at first in person, over the law-courts, but the *rex* was not bound by the decision of the assessors. He not only directed the course of the trial, but also laid down the principle (*jus dicit*) which was to apply to the particular case. In early times he often gave judgment himself. On him depended almost the whole administration of civil and criminal law[7].

odio sunt *nostrae secures*' &c. Cp. ibid. c. 34, 'non *imperium* non *secures*;' also Livy, xxiv. 9.

[5] Tac. *Ann.* iii. 26: 'Praecipuus Servius Tullius sanctor legum fuit, quis etiam reges obtemperarent.' Pomp., L. 2. § 1. *de Orig. Jur.*, says that Romulus 'leges curiatas ad populum tulit.' Cp. Livy, i. 8; Dion. Hal. iv. 36.

[6] Rubino (*Untersuch.* p. 18) has thrown great light on many points of the public law of ancient Rome, but he has gone too far in attributing the legislative power *exclusively* to the king. It is true that the terms *constituere, instituere, dare jus*, are used instead of the more modest expression, *rogare legem*, but the former do not imply that the senate and people had no right in the matter.

[7] Cic. *de Rep.*, 'omnia conficiebantur judiciis regiis;' *ibid.* ii. 31. Zonaras, *Annal.* vii. 13.

Military power.

The military power of the Roman kings was very extensive. In the field he had absolute power of life and death over both officers and soldiers. Even in republican times we see not only dictators, whose power was that of the kings undiminished, but also consuls, putting to death officers against the petition of the army, and even decimating whole legions[8].

Officials.

The king was the source of all other political and priestly offices. He nominated the *tribunus celerum*, the leader of the knights, and the *praefectus urbi*, who governed the city in his absence. From him the augurs and pontiffs derived their powers of divination and their knowledge of the sacred law[9].

Important position of the Roman king.

The essence of the *imperium* is a strong administrative power which can act decisively whenever and wherever political needs or momentary circumstances require, and which can enforce measures for the public welfare. Such a power was only exercised by the Greek kings to a very slight extent, and among the Germans was unknown; but in the Roman state it assumed the greatest importance from the first. As the Romans loved absolute rule over their family and their property, so their political *imperium* was also absolute. Their kings were not only judges in time of peace, their chief functions, as the name indicates, was that of governors (*rex*, *regere*).

In this way it becomes intelligible that the whole policy of the Roman state in the kingly period should be directed by the royal will, that all institutions should be referred to the kings, and that they should have been able to undertake and complete works which appear gigantic even in the present day. The king had to look after the supply of food and the cultivation of the soil, to watch over the morals of the citizens, and to exercise extensive police powers. All the functions which were afterwards divided among consuls,

[8] Livy, ii. 59; viii. 7; ix. 16. Brisson, *De Formul.*, p. 455, etc.
[9] Rubino, *Untersuch.* pp. 114 and 298.

prætors, censors, and ædiles, were originally combined in the single hand of the king [10].

To sum up: Rome was the first state in history to produce a human and national monarchy with complete concentration of political authority and with almost absolute administrative power.

[10] *Ibid.* p. 136.

CHAPTER X.

III. The Roman Empire.

The Empire not a mere collection of Republican offices.

The Roman Empire, which was founded by Julius Cæsar and established by Augustus, and which has exercised so great an influence upon the political development of all later times, was not formed, as has been sometimes maintained, out of a simple accumulation of republican magistracies. It was really a revival of the old monarchical power on a far vaster scale and in harmony with the intervening changes [a].

It is true that the Emperors assumed a number of functions which had belonged to republican magistrates: the *tribunicia potestas* secured their personal inviolability, gave them the right of veto, and enabled them to pose as champions of the lower classes: the censorial power [b] gave them the supervision of morals and the function of revising at will the lists of senators and knights: the dignity of *pontifex maximus* made them supreme arbiters of the sacred law. From time to time they took the office of consul.

[a] [Mommsen (*Röm. Statsr.* II. Abth. ii.) rightly describes the Principate, as instituted by Augustus, rather as a restoration than an abolition of the Republican constitution. Comp. *Mon. Ancyr.* 6. 12: 'in consulatu sexto et septimo . . . rem publicam ex mea potestate in senat[us populique Romani a]rbitrium transtuli.' Nominally the position of the *Princeps* was that of a magistrate raised above the rest by his superior *dignitas*, though in fact the possession of the *proconsulare imperium* made him supreme. But this itself was only an extension of republican precedent, and did not put the *Princeps* above the laws.]

[b] [Augustus held the *census* in virtue of the *consulare imperium*. But the censorship still existed as a separate office, and was held by later emperors, e. g. Claudius, Vitellius, Vespasian, and Titus. It was abolished by Domitian, and its duties were merged in the indefinite powers of the emperor. See Mommsen, *Röm. Statsr.* ii. 3. § 6.]

But the conception of their power did not rest upon this cumulation of offices, but upon the creation of a new centralised government, of a real monarchy. Republican forms might conceal the change for a time, but it was obvious to clear-sighted men even in the days of Augustus. At the accession of Tiberius the principle of monarchy was clearly expressed in the Senate by Asinius Gallus when he asserted that 'it was impossible to divide the indivisible, that the body of the state was one, and could therefore only be ruled by the mind of one man[1].'

The Emperors assumed only the modest title of *Princeps* (*Senatus*)[1a], but their power was so great that few could resist its temptations, and most of them were ruined either in intellect or in morals. The Empire was not hereditary but elective: its first holders were chosen, nominally for ten years, really for life. They were not regarded as of divine origin, and they recognised the supremacy of the people. Their authority was conferred upon them by a law of the people[2]. But though descent and family connexion were not in principle regarded in the choice of an emperor, they usually had great practical influence, and the chosen prince received in full personal right a power as extensive as that of the Roman people itself had been under the Republic. And when once that power had been conferred it could neither be diminished nor withdrawn.

Election to the Empire.

[1] Tac. *Ann.* i. 12. In i. 1, he says of Augustus: 'cuncta discordiis civilibus fessa nomine principis sub imperium accepit.' Comp. the conferences of Maecenas and Agrippa with Augustus in Dio Cass. 52.

[1a] According to Mommsen (*Röm. Statsr.* ii. 733), the name of *Princeps* has no reference to the *Princeps Senatus*, but is used in the sense of *Princeps omnium* or *civium*. [See also art. on *Princeps* by Prof. H. F. Pelham in *Journal of Philology*, viii. 323.]

[2] Ulpianus, L. 1. *pr. de constit. princip.*: 'Quod principi placuit, legis habet vigorem, utpote, cum lege regia, quae de imperio ejus lata est, *populus* ei et in eum omne suum imperium et potestatem conferat. Gaius, i. 5. § 6. *de jure nat.* [The *proconsulare imperium* was not conferred by a *lex populi*. The *Princeps* was recognised as *Imperator* by the salutation of the senate or of the army. On the other hand, he received the *tribunicia potestas* by a law of the *comitia* (the *comitia tribuniciae potestatis*) following on a decree of the senate. See Mommsen, *Röm. Statsr.* ii. pp. 812–3, 838–9.]

Analysis of imperial power.

The imperial power, in addition to the special magistracies which the Emperor usually held, may be thus analysed:—

1. The disposal and command of the whole military forces of the state, and of the prætorian guard in the city. The introduction of standing armies, which became necessary as the boundaries were extended, secured the existence of the empire and enforced obedience [3]. It was this function which gave to the emperors the title of *imperatores*, which had a different meaning in earlier times.

2. The absolute government of the richest and most important provinces [?], from which the Emperors derived enormous wealth and power. On the whole, the provinces gained considerably by the change of constitution. Their great men were admitted to the senate and to office by the Emperors, while the oppressions and exactions of the imperial *legati* were far less than those of the ever-changing proconsuls and proprætors of the Republic. The more permanent interests of the Emperors enjoined a more merciful and orderly administration.

3. The decision of all questions of foreign policy, the right of peace and war, and of concluding treaties [4].

4. The right of convening the senate, of proposing matters for discussion, and of giving legal force to its decisions [5]. It is well known how obsequious and submissive the senate was to the Emperors.

5. A decisive voice in the appointment to magistracies and all important offices. Both the *comitia* (which retained for a time a formal existence) and the senate were bound

[3] Maecenas urged Augustus strongly to form a standing army (*στρατιώτας ἀθανάτους*), and to leave the mass of the people to their peaceful occupations. Dio Cass. 52.

[4] *Lex de Imp. Vespasiani*, in Bruns, *Fontes Juris Romani*, p. 118: 'foedusve cum quibus volet facere liceat.'

[5] *Ibid.*: 'utique ei senatum habere, relationem facere, remittere senatus consulta per relationem discessionemque facere liceat . . . utique cum ex voluntate auctoritateve jussu mandatove ejus praesenteve eo senatus habebitur omnium rerum jus perinde habeatur servetur ac si e lege senatus edictus esset habereturque.' [See also Mommsen, *Röm. Statsr.* ii. 860 ff.]

by law to respect the Emperor's recommendation of candidates[6].

6. The absolute power of acting for the welfare and honour of the state, which forms the real essence of the imperial authority[7]. It was by virtue of this power that not only the edicts, but also the decrees and rescripts of the Emperor obtained the full force of laws, so that he was able to cover the whole field of legislation[8].

To prevent any hostile criticism or resistance, the *lex de imperio* definitely announced that it overrode all other laws, whether of the senate, the *populus*, or the *plebs*, and that no one could be brought to account for breaking the latter in obedience to itself. The irresponsibility of the Emperor was not confined to himself, but was also extended to all his ministers and agents—the very opposite of the modern system[9].

In fact the imperial power was absolute and unlimited[10]; it held the same position in the state that the right of property and the *patria potestas* held in private life. It was the concentration of the Roman world-rule in the hands of an individual. Its ideal principle, seldom followed in practice, was the public welfare (*salus publica*). This great political principle of the Romans becomes, in later times

[6] *Lex de Imp. Vesp.*: 'utique quos magistratum potestatem imperium curationemve cujus rei petentes senatui populoque Romano commendaverit quibusque suffragationem suam dederit promiserit eorum comitis quibusque extra ordinem ratio habeatur.'

[7] *Ibid.*: 'utique quaecumque ex usu reipublicae majestate divinarum humanarum publicarum privatarumque rerum esse censebit ei agere facere jus potestasque sit.'

[8] Savigny, *System des röm. Rechts*, i. p. 121 ff.

[9] *Lex de Imp. Vesp.*: 'Si quis hujusce legis ergo adversus leges rogationes plebisve scita senatusve consulta fecit fecerit sive quod cum ex lege . . . facere oportebit non fecerit hujusve legis ergo id ei ne fraudi esto neve quid ob eam rem populo debere debeto neve cui de ea re actio neve judicatio esto neve de ea re apud . . . agi sinito.'

[10] The name of *dominus*, which suggested *servi* by contrast, was rejected as an insult to the people by the early emperors. Sueton. *Octav.* 53: 'domini appellationem ut maledictum et opprobrium semper exhorruit.' Ib. *Tib.* 27; Tac. *Ann.* iv. 37, 38. The gross flattery of later times introduced the term as a regular title.

at any rate, more important in all state matters than personal right (*jus*), though the latter was nobly developed in the domain of Private Law.

The history of the Roman Empire, magnificent as are its proportions, has bequeathed this lesson to the world—that such excessive power is beneficial neither to the ruler nor to his subjects [11].

Causes of the Empire.

The rise of the Empire may be justified by the fatal necessity created by general corruption and decay. The Roman aristocracy was degenerate and impotent to guide so unwieldly a state. From time to time it strove to restore its former authority, but as a rule it passively yielded to the force of circumstances [12]. The mass of the people, with no claim to rule, no longer accustomed to arms, devoted to the occupations and joys of peace, preferred the government of a single Emperor to that of the senate, and consoled themselves for their own impotence with the humiliation of the nobles. The character of the Roman people decayed sooner than their ability, and their own slavery was a fitting penalty for that insatiable lust of rule which had urged them on from conquest to conquest.

[11] Compare the following words of Tiberius, which may have been honestly meant at the time, with his actions. Sueton. *Tib.* 29: 'dixi nunc et saepe alias, Patres Conscripti, bonum et salutarem principem, quem vos tanta et tam libera potestate exstruxistis, senatui servire debere et universis civibus saepe et plerumque etiam singulis: neque id dixisse me poenitet.'

[12] The occurrences at the time of Claudius' accession show that the lower classes of Rome had no great love for the republican constitution.

CHAPTER XI.

IV. The Frankish Monarchy.

Carolingian monarchy.

The German tribe of the Franks founded a great empire upon Roman soil. Their monarchy, a combination of Roman and German elements, marks the transition from the organisation of the ancient world to that of the middle ages[1]. The Frankish king was more powerful than his purely German predecessors, but less absolute than the Roman emperors. The monarchy that existed in the time of Charles the Great was formed by the mixture of the German ideas of freedom and law with the Roman conceptions of the power and supremacy of the state.

Causes of its strength;

Several causes combined to strengthen the power of the Carolingian kings: a remarkable succession of distinguished and fortunate rulers; the rapid increase of their territorial empire, which demanded a powerful and comprehensive government; the necessity of a strong military force always ready for action; the victories achieved by this force; and finally the fact that the majority of their subjects had been brought up under the Roman Empire, and were accustomed to its conceptions and its vigorous institutions.

hereditary succession.

In one point monarchy took a backward step among the Franks. The hereditary principle, derived from private property, was applied to the crown, and the old election shrunk up into an almost meaningless form. This gave rise

[1] For the stages of the transition in the case of the other German tribes which settled upon Roman soil, see Felix Dahn, *Die Könige der Germanen.*

to the division of the empire among several sons, which proved the source of serious harm both to the State and the nation[2]. The succession to the throne belongs properly to politics and to public law, which demand the unity of the state, but the Frankish practice treated the function of rule as if it were merely the possession of an individual or family, and thus conformed in this point to what we have called above the *patrimonial* principle[3].

The following are the chief changes which the Franks introduced into the kingly power:—

Legislation among the Franks.

1. Legislation became much more important in the Frankish empire than it had been in the narrow circle of a single German tribe, and at the same time it fell more under the influence of the kings than before. The Roman maxim that 'the emperor's will has the force of law' was naturally unacceptable to a nation of German origin. But among the Franks the right of proposing laws, which was generally decisive, passed to the king and his council. The king's *sanction* was needful to give validity to laws, and they were promulgated in his name.

But it is very important to remember that the counsel and consent of the assembled nobles, both ecclesiastical and secular[4], was regarded both by custom and by law as indis-

[2] Charles the Great made a slight effort to remedy these evils in his Capitulary on the division of the Empire in 806, c. 6: 'placuit inter praedictos filios nostros statuere atque praecipere, propter pacem quam inter eos perpetuo permanere desideramus, ut nullus eorum fratris sui terminos vel regni limites invadere praesumat, neque fraudulenter ingredi ad conturbandum regnum ejus vel marcas minuendas; sed adjuvet unusquisque illorum fratrem suum, et auxilium illi ferat contra inimicos ejus juxta rationem et possibilitatem, sive inter patriam, sive contra exteras nationes' (in Pertz, *Monumenta Germaniae Historica, Legum* tom. i. p. 141). C. 5 of the same law mentions election by the people. Comp. Eichhorn, *Deutsche Stats- und Rechtsgesch.* i. §§ 139 and 159; Guizot, *Essais sur l'Histoire de France*, pp. 206 ff. See especially Waitz, *Deutsche Verfassungsgesch.* iii. 274 ff.

[3] Thus the succession to the throne was treated on the same principles as the *terra salica*. Comp. Zöpfl; z. ii. § 33; Waitz, iii. 274.

[4] Hincmar, *de Ordine Palatii Epistola* [in Migne, *Patrologia*, tom. CXXV. cols. 993–1008; also published separately with a French translation by M. Prou in the *Bibliothèque de l'École des Hautes Études*, fascic. 58], c. 29: 'in quo placito (the *Campus Maii*) generalitas universorum

pensable for legislation. On the other hand, the approval of the people was of very subordinate importance, and was usually dispensed with except in matters which concerned the organisation of church and state, or the rights of the people themselves (*Volksrecht*)[5].

In this co-operation of the nobles we see the first step towards that representation of estates (*ständisch*) which obtained such great development in subsequent centuries, and which has produced the representative state.

Government.

2. Government. The size of the state and the great political changes that were going on rendered necessary an administrative power which was unknown to the older Germans. It was no longer merely a matter of maintaining peace and law, but some regard must be paid to the general welfare. The idea of the Roman *imperium* was too foreign to be accepted, so the Franks found a basis for their new government in the native *mundium* or guardianship (*mundiburdium*, also *sermo* or *verbum regis*). This royal guardianship bears the same relation to the Roman *imperium* as that

majorum tam clericorum quam laicorum conveniebat: seniores, propter consilium ordinandum; minores, propter idem consilium suscipiendum et interdum pariter tractandum, et non ex potestate sed ex proprio mentis intellectu vel sententia confirmandum.' *Ibid.* c. 30: 'aliud placitum cum senioribus tantum et praecipuis consiliariis habebatur (usually in autumn but oftener if needed), in quo jam futuri anni status tractari incipiebatur.' [See also Waitz, *Deutsche Verfassungsgesch.* (ed. 1860), iii. 478, etc.] Hence many of the Capitularies contain such expressions as 'cum consilio servorum Dei et optimatum meorum' (*Cap. Karlomanni*, a. 742, Pertz, i. 16), and 'cum consensu episcoporum comitum et optimatum Francorum' (*Cap. Pippini*, a. 744, Pertz, i. 20). The treaty of 851 between the sons of Lewis the Pious says expressly in c. 6 (Pertz, i. 408): 'Et illorum, scilicet veraciter nobis fidelium, communi consilio, secundum Dei voluntatem et commune salvamentum, ad restitutionem sanctae Dei ecclesiae et statum regni, et ad honorem regium atque pacem populi commissi nobis pertinenti, adsensum praebebimus; in hoc, ut illi non solum non sint nobis contradicentes et resistentes ad ista exsequenda, verum etiam sic sint nobis fideles et obedientes ac veri adjutores atque cooperatores, vero consilio et sincero auxilio, ad ista peragenda quae praemisimus, sicut per rectum unusquisque in suo ordine et statu suo principi et suo seniori esse debet.'

[5] *Capit. Car. Magni*, a. 803 (Pertz, *Legum*, i. 115), c. 19: 'Ut populus interrogetur de capitulis quae in lege noviter addita sunt. Et postquam omnes consenserint, subscriptiones et manufirmationes suas in ipsis capitulis faciant.'

of the powers of a German father or husband to the Roman *patria potestas*. Its power is not at all arbitrary or absolute; its chief functions are the protection of the rights and the furtherance of the welfare of the people[6]; in fact it indissolubly combines the conception of duty with that of right. This novel idea is not yet fully clear, but it contains a healthy germ, which is capable of real political development.

Military power.

In this form of monarchy the king both can and must command. His commands were issued in the so-called *ban*, which was both military and judicial (*Heerbann* and *Gerichtsbann*). By the military *ban* he had at his disposal the whole armed force of the kingdom, though his power was limited by custom and by fixed rules of service. But strong kings, and notably Charles the Great, summoned even for aggressive wars not only their feudal following, but whole divisions of the people in arms (*Heerbann*), and threatened defaulters with the severe penalty of sixty shillings[7].

Judicial power.

The judicial *ban*, so important for the administration of the country, belonged to the king, but was usually exercised through the counts of districts (*Gaugrafen*), whose powers were derived from the king. As the organisation of the state grew stronger, limits were placed upon the old rights of private war in civil disputes and criminal cases, and throughout the land the king's peace, protected by the royal ban, replaced the old national peace which had been too easily broken.

The revenues of the royal chamber and exchequer, which had increased considerably, were at the king's absolute disposal. The royal domains received large additions from the

[6] Du Cange, *Glossarium, s. v. mundiburdis et mundiburdium; Capit. Car. Magni*, a. 802, c. 40 (Pertz, i. 96). Hincmar, *de Ord. Pal.* c. 6: 'Et rex "in semetipso nominis sui dignitatem custodire debet. Nomen enim regis intellectualiter hoc retinet ut subjectis omnibus rectoris officium procuret."'

[7] Zöpfl, ii. § 36. *Capit. Car. Magni*, a. 811, c. 1 (Pertz, i. 172): 'Quicumque liber homo in hostem bannitus fuerit, et venire contempserit, plenum heribannum, id est solidos sexaginta, persolvat.'

conquest of Roman provinces and the suppression of ancient kingdoms and duchies, and all over the country were to be found royal residences and palaces surrounded by vast estates. The old land- and poll-taxes of the provincials were retained, the Roman duties on commodities were augmented, tribute was imposed upon the conquered peoples, and large sums exacted from them by way of indemnity [8].

Administrative officials.

3. The royal power made itself felt in every branch of the administration by means of an organised system of officials dependent upon the king. After the model of the Byzantine court, the most important of these officials were grouped round the king's person. Among these were the *comes palatii* (*Pfalzgraf*), the supreme judge and representative of the king; the chaplain (*apocrisiarius*, *referendarius*), who was at the head of the court clergy, and had to report about ecclesiastical affairs; the chancellor (*camerarius*), who presided over the royal chancery and conducted diplomatic correspondence; the chamberlain, who organised the pomp and show of the court; the seneschal, responsible for the servants and the domestic managements; the cellarer, who received payments in kind and provided the wine for the royal table; the marshal (*marescalcus*, or *Rossknecht*), the manager of the stables; the house-steward (*mansionarius*), whose duty it was to see that the king had a suitable residence on his journeys; the four chief huntsmen, and the falconer [9].

The itinerant officials of the king (*missi dominici*) were sent out yearly to visit the different provinces of the kingdom. It was through them that the king was enabled to see clearly the condition of affairs, to hear the complaints and wishes of the people, and to act with decision when it was necessary to enforce obedience to the laws and to protect public order [10].

[8] Comp. Zöpfl, § 40; Waitz, ii. 498 ff.

[9] See Hincmar, *de Ord. Pal.* cc. 16–24; Waitz, iii. 499 ff.

[10] *Capit. Car. Magni*, a. 802 (Pertz, i. 97–99), and a. 810 (*Ib.* i. 163–4); Guizot, *Essais*, pp. 191 ff.; Waitz, iv. 411–488.

The counts of districts or shires (*Gaugrafen*) had supreme judicial power, while that of the counts of hundreds (*Zentgrafen*) was limited. Both derived their jurisdiction, the one directly and the other indirectly, from the king, as the supreme judge upon earth. Their military powers sprang from the same source. In the early period of the Frankish monarchy the position of count was not hereditary, but was a real office, to which the king had the right of appointment. Under Charles the Great's successors, however, the natural tendency to hereditary succession soon began to obscure this official character and to create a hereditary right to the dignity.

Gradually the *missi dominici* became obsolete, the duchies were restored, and the offices of the kingdom sank into family property. Thus the power of the Romano-German monarchy perished, and the aristocracy of princes and lords took its place.

Close connexion with Empire and Church.

4. There is one other notable point about the Frankish monarchy, and this is its close connexion with the Western Empire—a connexion established by Charles the Great—and of both with the extension of Christianity and with the Christian Church.

The state had become Christian, and the monarchy had received consecration at the hands of a priest[11]. The king felt himself bound to maintain and extend the pure Christian belief in his territories, while his duty as emperor was to destroy heathenism and heresy as far as his power reached. This duty was fulfilled by Charles the Great on a large scale and with great severity[12]. Christendom itself was represented as a single body with two organisations, one sacerdotal and the other monarchical, Church and State[13]. But

[11] Hincmar, *de Ord. Pal.* c. 5: 'principes sacerdotum sacra unctione reges in regnum sacrabant.'

[12] Even before he received the imperial dignity, Charles the Great bore the title 'devotus sanctae Dei ecclesiae defensor humilisque adjutor.'

[13] See Hincmar, c. 5. for the reported saying of Pope Gelasius to the Emperor Anastasius: 'duo sunt (potestates) quibus principaliter, una

though the king was the head only of the latter, he enforced among the clergy also the recognised Christian discipline. He summoned synods, superintended the conduct of bishops and monasteries, and issued many laws and ordinances on ecclesiastical matters. So too the spirit of the hierarchy exercised a marked influence upon political institutions and upon the legal principles of the secular organization [14].

cum specialiter cujusque curae subjectis, mundus hic regitur: auctoritas sacra pontificum et regalis potestas.' [See Migne, *Patrologia*, lix. col. 41; also Bryce, *Holy Roman Empire*, chap. vii.]

[14] Comp. Eichhorn, i. § 158.

CHAPTER XII.

V. Feudal Monarchy and Monarchy limited by Class Privileges.

A. *Feudal Monarchy.*

Decline of Carolingian Monarchy.

The Frankish monarchy contained all the essential conditions of a true monarchy, and so far it is the beginning of a new development of the modern state. But the opposing powers and passions were so strong in the nation, and the traditions of German nobles and freemen were so hostile to a strong central administration, that it was only possible for exceptionally powerful rulers to exert to the full their kingly authority and to bring out the real character of the state. Weak kings were powerless, and under their rule the tendency was obvious to dissolve the unity of the state, to limit and discredit the central power, and to give independence to local governments.

Feudal Monarchy,

With the decline and extinction of the Carolings the royal authority sank into obscurity, and the princes and lords seized the administration of isolated peoples and territories. The Romano-Germanic universal monarchy was replaced by the feudal monarchy, which gives to the middle ages their special political character.

its characteristics.

The following are the most notable characteristics of feudal monarchy :—

It is based upon Classes.

1. Every previous monarchy had been based upon a tribe or a nation or a united people, and might therefore be called a national or popular (*volksthümlich*) institution. But the

feudal monarchy, although connected with a special nation of which the king is the head, had its essential basis in the personal bond of fealty between the king, the supreme lord of the land, and his vassals, who derived from him their power, rank, and property. The mass of the people, as not being bound by this feudal tie, were only regarded in a subordinate and indirect way. Thus the monarchy was rather the institution of a class or estate than of the nation: it was founded not so much upon the people as upon the feudal vassals (*Gefolgeschaft*).

Fealty and Homage.

2. Personal fidelity, ennobled and strengthened by the idea of honour, became now an important political conception[1]. All vassals, on receiving their fiefs from a lord, swore to him the oaths of fealty and homage[2]. These oaths and the whole feudal system may be most clearly traced in the mixed Saxon and Norman law of the English kingdom. The tenants in chief took the oath of homage (*Mannschaftseid*)[3] to the king upon their knees, while they stood to swear the oath of fealty[4] with their hand upon the gospels. Bishops and abbots were exceptions, as they took the latter oath only. The oath of homage was the more

[1] In Tacitus' account of the German *comitatus*, he points to these moral qualities as the basis of the institution; v. *Germ.* 13, 14: 'Magnaque comitum aemulatio, quibus primus apud principem suum locus; et principum, cui plurimi et acerrimi comites. Haec dignitas, hae vires; magno semper electorum juvenum globo circumdari in pace decus, in bello praesidium . . . . Quum ventum in aciem, turpe principi virtute vinci, turpe comitatui virtutem principis non adaequare. Jam vero infame in omnem vitam ac probrosum superstitem principi suo ex acie recessisse. Illum defendere tueri, sua quoque fortia facta gloriae ejus assignare praecipuum sacramentum est. Principes pro victoria pugnant, comites pro principe.'

[2] In French legal phrase, *foi et homage*.

[3] The formula of this oath shows the importance attached to personal fidelity. Bracton (*Rolls Series*), i. p. 632: 'Devenio homo vester, de tenemento quod de vobis teneo, et fidem vobis portabo de vita et membris et terreno honore contra omnes gentes.' Comp. Du Cange, *s. v. homagium*.

[4] Bracton, i. 632, gives the formula of the oath of fealty; 'Hoc audis, domine, quod fidem vobis portabo de vita et membris, corpore, et catallis, et terreno honore, sic me Deus adjuvet et haec sancta Dei evangelia.' Comp. Du Cange, *s. v. fidelitas*.

specially and directly connected with the possession of the fief. The oath of fealty was more general, and could therefore be exacted from other subjects who were not bound by the feudal tie. Instances of this are to be found in the Carolingian times, doubtless under the influence of feudal conceptions [5].

The fealty thus sworn was mutual. The lord was equally bound with the vassal, but the latter alone was bound to homage [6].

Tenure of Land.

3. The endeavour on the part of the feudal monarchy to bring all subjects into the relation of vassalage had a material influence upon the tenure of land. The Norman kings of England strove to obtain supreme possession (*Obereigenthum*) of the whole land, so that not only all fiefs, but also allodial estates, were regarded as being derived from the king. Thus the national right of free property in the soil was transformed into the feudal right of dependent occupation or tenure [7]. This is a general characteristic of feudalism, but it is especially clear in the history of English law [8].

Authority derived from the King.

4. By parallel steps all political power came to be regarded as derived from the king. The king received his authority as a grant from God [9]. The lords received their

[5] *Capit. Car. Magni*, a. 811, c. 13 (Pertz, i. 175): 'Ut missi nostri populum nostrum iterum nobis fidelitatem promittere faciant secundum consuetudinem.'

[6] This is expressed in the English maxim, 'quantum homo debet domino ex homagio, tantum illi debet dominus ex dominio.' Reeves, *Hist. of English Law* (ed. by Finlason, 1869), i. 175. *Assises de Jérusalem, Haute Cour*, 322 (Kausler, p. 372): 'L'assise et la lei de Jérusalem juge et dit que, autant doit li rois de fei à son home lige, come l'home lige doit à luy, et ains est tenu li rois de guarantir et de sauver et de desfendre ses homes liges vers toutes gens qui tort leur vorreent faire, come ses homes liges sont tenus à lui de guarantir le et de sauver vers toutes gens. Et, por ce, ne peut il mie mettre la main sur son home lige sans esgart de ces pers.'

[7] See above, Bk. ii. chap. 11, note.

[8] In France the cognate principle, *nulle terre sans seigneur*, was accepted as early as the thirteenth century; Loysel, ii. 2. 1. The feudal system was never so widely extended in Germany or Italy.

[9] According to the *Sachsenspiegel* (i. 1), God gave the temporal sword to the emperor alone; whence it followed that kings only received their power through the emperor. This theory, however, was not

right to rule from the supreme feudal lord, the king, just as the planets derive their light from the sun [10]. But they ruled, not as mere officials of the state or organs of the government, but by their own right and for their own ends, in the same way as they held their fiefs. This combination of political rule with personal independence, and the hereditary connexion of the various grades of authority with certain families and estates, are specially characteristic of the feudal system. The king cannot refuse to grant authority to his vassals who have a hereditary right to it, nor can he interfere with the exercise of that authority, nor define or limit its scope. Every circle of the administration is essentially distinct and independent.

Power of the nobles.

Thus the unity of the State existed only in form. Any attempt to act with decision was met by insuperable difficulties. The greater and lesser vassals thwarted and restricted the central power, instead of acting as its agents. The national life was split into a variety of individual forms, and the single state was dissolved into a number of petty sovereignties. Free scope was given to the will and the inclination of individuals, especially of the magnates, but no common political action of the whole body was possible. The aristocracy alone was powerful and free: the monarchy had dignity without strength: the people found the natural development of its powers obstructed on all sides. The further the lower classes were removed from the centre, from the feudal suzerain, the more oppressive was the arbitrary authority of the intermediate lords.

The two elements of the monarchical power among the Germans, the military and the judicial *ban*, were now divided among the numerous lords and vassals. The executive

generally accepted, and the kings, while respecting the superior dignity of the emperor, professed to derive their power immediately from God. As an old French maxim put it, 'Le roi ne tient que de Dieu et de l'épée.' Loysel, i. 2.

[10] *Sachsenspiegel*, iii. 58.

government was far weaker and more limited than that of the Frankish kings. The whole constitution had become *aristocratic*, although monarchy was retained as an ornament. The kings of the Capet line had little to distinguish them from the great lords [11]: even the German kings were often foiled in internal affairs by the action of the princes. It was only exceptionally, when circumstances were specially favourable or dangers specially threatening, that the kings were enabled to exercise a strong central power. That this was the case in England after the Norman Conquest was due, partly to the fact that the Norman nobles saw their own security in a close alliance with the crown, and partly to the necessity of an energetic government to maintain the new dynasty on the throne.

Guizot's account of Feudalism.

5. Guizot has propounded the question why it is that feudalism was always hateful to the people, not only at the time of its decay, but when it was at the zenith of its power. The chief reason for this is thus stated by him: 'Feudalism was a confederation of petty sovereigns, of petty despots, unequal among themselves and bound by duties and rights to each other, but invested with arbitrary and absolute powers in their own domains, over their direct and personal subjects. . . . Of all tyrannies the worst is that which can thus count its subjects and can see from its seat the boundaries of its rule. The caprices of human will were there manifested in their intolerable variety and with irresistible promptitude. It was a system in which the inequality of conditions was most rudely visible: wealth, power, independence, all the advantages and rights stood in immediate and visible contrast with misery, weakness, and servitude. . . . Despotism was as great as in a pure monarchy, privilege was as much developed as in an organised

[11] Hugo Capet wrote to the Archbishop of Sens: 'Regali potentia in nullo abuti volentes, omnia negotia reipublicae consultatione et sententia fidelium nostrorum disponimus.' Mirabeau, *Essai sur le despotisme*; *Œuvres*, ii. p. 390. Comp. Luchaire, *Histoire des Institutions Monarchiques*, i. 243 ff.

aristocracy, and both displayed themselves in the crudest and most offensive form. Despotism was not mitigated by the distance and elevation of a throne; privilege was not disguised under the majesty of a great corporation. Both belonged to an individual who was always present, always alone, and always in close neighbourhood to his subjects.[12]'

This description contains some truth, but in its entirety it applies to France alone among mediæval states. The feudal system was not everywhere detested, and the attachment even of peasants to their lord was not rare. Also it was not essential to the system that the lords should have 'arbitrary and absolute power' over their vassals. Where such power was exercised—as was the case in France and too often in other countries—it was in direct opposition to the system which established, from the summit to the base, circles of administration in which the powers were derived from above and independent. Even the serfs had fixed hereditary rights; their duties could not be increased at the lord's will, and their persons could only be disposed of according to tradition and customs. The manorial law (*Hofrecht*) had the same fixity and sanction for the lower, as the feudal law for the higher classes [13].

The system was not wholly oppressive.

But apart from the cases in which the lords exceeded their rights, there can be no doubt that the small size of the lordships and the difficulty of escaping from oppression, which was so close at hand, were among the worst characteristics of feudalism.

6. The Feudal State was pre-eminently a legal state (*Rechtsstat*). Although the principle of the public welfare was obscured, the various political rights were clearly limited and defined. Like private and personal rights, they could be

Existence of political rights.

[12] Guizot, *Essais* (No. v. *Du caractère politique du régime féodal*), pp. 303–5.

[13] This is proved by numerous local customs and judicial decisions (*Weisthümer*). Many of these point to a defiant attitude on the part of the peasants towards their lords.

disposed of at will by the ordinary legal processes of sale, exchange, donation, inheritance, etc. They were protected either by judicial process or by the admitted right of private war. On the one hand, there was a definite legal organisation which secured freedom to individuals and to separate corporations, but not to the nation as a whole: on the other hand, there was a continuous internal war, an ever-recurring anarchy. These, like the double face of Janus, are the two inconsistent appearances presented by the feudal state in the middle ages.

B. *Monarchy limited by Estates or Class Privileges.*

Limits on the royal power.

Before the close of the middle ages feudal monarchy gradually gave way to a monarchy limited by class privileges (*ständisch beschränkte Monarchie*) which is the mediæval predecessor of the modern representative monarchy. From about the year 1250 this form prevailed in most of the European states, and it lasted for three centuries until in the sixteenth it was transformed into absolute monarchy.

The king or prince still derived his power from God or from his suzerain, and regarded this power as the property of himself and his dynasty. Within the range of his princely authority he felt himself to be master and endured no opposition to his will. But the range was now very limited: everywhere the prince was confronted by the rights of classes, of corporations, and of individuals, which he was bound to respect as he would have his own rights respected. The possessor of these rights was prepared to defend them, if necessary, with arms or with the more peaceful weapons of law.

Legislation.

The king had no *legislative power* by himself. The counsel and consent of the national estates (*Reichsstände*) were necessary for the edicts of the king, the approval of the provincial estates (*Landstände*) for those of the prince.

Administration.

The *administrative power* was still very slightly developed and very limited. There was no body of officials to carry

out the will of the central government. The tenants in chief, to whom the royal rights were entrusted, exercised them within their domains as their own. The court offices were held, mostly in hereditary succession, by vassals and ministers who served their lord according to traditional forms with more show than reality. Usage and etiquette, the traditions of classes, and family spirit were far more influential than the sentiment of duty to the law and public spirit. The provincial estates, in which the nobles preponderated, exercised an often oppressive control over the princely government by their complaints and remonstrances. Not infrequently they attacked the prince's ministers and called for their dismissal or their punishment. Sometimes they demanded the guardianship of the prince's person, or that their commissioners should be entrusted with a share in the government.

Jurisdiction.

The king was still regarded as the supreme judge, and occasionally sat in person to administer justice. But the judgment was pronounced by the assessors (*Schöffen*), and the king had only to carry it out. He himself was bound by the law and could be called to account for wrong-doing. It was an old German custom that every lord possessing judicial rights should, if accused, be tried before his own representative. Thus the German king, though at the same time he was Roman Emperor and the secular head of Christendom, could, under certain circumstances, be compelled to appear before the Count Palatine of the Rhine, and to submit himself to the judgment of the princes. So, too, the count (*Graf*) might be judged by his acting magistrate (*Schultheiss*).

Police.

The *police administration* was undeveloped and usually combined with the functions of the judge. There were as yet no gens d'armes, and the modern police system was non-existent.

Military powers.

Even the *military power* of the prince was restricted by the feudal laws and customs. The vassals owed only a fixed and very limited service, and this they regarded as a burden

on their land and were eager to prevent any energetic use of it.

The German kings frequently experienced how difficult it was to check the defiant independence of the great dukes, and how little the fealty of the princes of the empire towards their head could be relied upon.

It was possible for kings and princes to obtain a more submissive and useful army by employing mercenaries, and this was often done. But mercenaries had to be paid, and if the estates refused to grant any taxes for the purpose, their pay had to come out of the king's personal revenue, and this often involved him in debt and difficulties. Moreover, as these mercenaries were often foreigners, they made the prince hateful to the country which they held in servitude.

Taxation.

The king had no right to raise *taxes* except when the estates had first recognised their necessity and approved their levy, which an aristocratic body was by no means inclined to do. Many of the taxes were gradually made into charges upon real property, the burden of which fell mostly on the lands of the peasants, and they thus became fixed and invariable. In this, as in the other points, it is obvious that both estates and individuals were wanting in a sense of common duties to the State.

CHAPTER XIII.

VI. Modern Absolute Monarchy.

The mediæval monarchy, limited by privileged classes, was directly followed, not by the modern representative monarchy, but by absolute monarchy, which obtained strength from the struggle with the estates. Both the mixed German and Romance and the pure German nations of Europe had to pass through this stage before they could realise the modern form of state. Rise of absolutism;

Absolutism appeared first and most conspicuously in France and Spain. Where the German element preponderated in a nation, it was difficult for the kings to establish despotism, which conflicted with the legal principles and traditions of the Germans. Roman traditions, on the other hand, which were now revived both in theory and in practice, were altogether favourable to monarchy [1]. in the Romance countries.

Ever since the twelfth century, when feudalism was at its zenith, the French lawyers had been striving with united energies to establish the monarchy upon the old foundations of the imperial law of Rome. The maxim of their school was that the government must be one, indivisible, and absolute, qualities which they combined under the expression of a sovereign power. Starting from this point, they treated the rights of jurisdiction and government enjoyed by the feudal nobles as encroachments and abuses, inconsistent with the interests of king and people, and either to be swept away or to be limited as much as possible. They

[1] Thierry, *Récits des Temps Mérovingiens*. i. 16.

represented the French kings as the successors of the Roman emperors, Roman law as the one true law, the legal usages of feudalism they treated with disdain. Centuries elapsed before these theories were carried out in practice and the rule of the nobles was really broken. But the internal struggle never ceased until the feudal system with its variety of forms had been annihilated, and absolute monarchy, which had been growing stronger and stronger, arose upon its ruin.

The maxim of the Roman law, *quod principi placuit legis habet vigorem*, was revived as a principle of politics in the French form, *Qui veut le roi, si veut la loi*[2]. When once unrestricted power of legislation was conceded to the king, it was easy for him to remove the obstacles which feudalism and the rights of the estates had opposed to the development of the central power, of the national spirit, and the public welfare. The judicial tribunals, inspired by the study of Roman law, and especially the Parliaments of Paris and the provinces, helped to give the victory to this tendency. Public opinion, especially in the towns, which had preserved Roman traditions and had been to some extent free from feudal influences, was favourable to the new conception. The citizens hated the lesser nobles more than they feared the king, and hoped, by weakening the former, to secure the progress of their trade and manufacture. The peasants also gained rather than lost by the increase of the royal power over their aggressors.

Monarchy triumphed over feudalism, in France under Louis XI (1461–1483)[3], in Spain under Philip II (1556–

[2] Beaumanoir, ii. 57: 'Ce qui li pleot a fere, doit estre tenu por à loi'; but he adds as a limitation, 'pourvu qu'il ne soit pas fet contre Dieu, ne contre bonnes meurs, car s'il le feroit, ne le devroient pas si souget soufrir.' Even in 1688, in the reign of Louis XIV, Delaunay stated the principle in no absolute sense: 'que la loy est la volonté du Roy et non pas que la volonté du Roy soit loy.' But at all times ardent partisans could be found to exalt the monarchical power above the limits which the middle ages had imposed upon the Roman principle.

[3] Louis XI forbade the Duke of Brittany to use the expression, 'par

1598). In France there were occasional reactions, but in Spain absolutism was more secure and showed itself more sombre and cruel. One is horrified to think that Philip II ventured to condemn as criminals the whole population of the Low Countries, over which he had received only limited rights of government. It was not till Louis XIV's reign that the absolute power of the French monarchy reached its zenith, and from that time it went rapidly downwards towards the precipice of the Revolution. The German dynasties, great and small, set themselves to copy Louis XIV[4], and in the eighteenth century a Christian ruler, Joseph I, condemned to death the whole Bavarian people, which he ruled only by usurpation, and justified himself by an appeal to his divine right[5].

Principles of Absolute Monarchy.

The political principle of this new absolutism was expressed by Louis XIV with surprising naiveté in his famous phrase *L'état c'est moi.* The king no longer regarded himself as the head, the highest and most powerful member of the

la grace de dieu,' which had previously been usual in the case of all the great lords. Schäffner, *Französ. Rechtsgesch.* ii. 273. The death of Charles the Bold of Burgundy in a war with the Swiss, which Louis had helped to bring about, removed the leader of the feudal aristocracy and decided the victory of the monarchy in France.

[4] Frederick the Great in the *Antimachiavel*, 10: 'Il n'y a pas jusqu'au cadet du cadet d'une ligne appanagée, qui ne s'imagine d'être quelque chose semblable à Louis XIV. Il bâtit son Versailles, il a ses maîtresses, il entretient ses armées. Ils s'abîment pour l'honneur de leur maison, et ils prennent par vanité le chemin de la misère et de l'hôpital.'

[5] Hormayr, *Lebensbilder*, i. 256, Patent of Joseph I (20 Dec. 1705): 'Alle Bayern seyen der beleidigten Majestät Josephs I als des ihnen von Gott dem Allmächtigen vorgesetzten alleinigen rechtmässigen Landesherrn schuldig, und daher ohne weiters mit dem Strange vom Leben zum Tode zu richten. Nur aus allerhöchster Clemens und landesväterlicher Mildigkeit (!) werde verordnet, das allezeit 15 zu 15 um's Leben spielen und jene, auf die das wenigste Loos fällt, im Angesicht aller aufgehenkt werden solle.' ['All Bavarians are guilty of treason towards Joseph I, the lawful ruler appointed by God to rule over them, and are therefore condemned to death by the halter. But out of supreme clemency and paternal gentleness (!) it is ordained that lots shall be cast for their life among every thirty men, and that the fifteen upon whom the lot shall fall shall be hanged in the presence of all.'] It is astounding to read such an insane interpretation of law and mercy in the eighteenth century, just before the commencement of the age of philosophic enlightenment.

body politic, but he completely identified the State with his own person, so that no member of the State except himself was endowed with political rights. His personal welfare was the welfare of the State, his individual rights were the rights of the State. He was all in all, beyond him was nothing.

This identification of the monarchy with the State—quite different from the personification of the majesty of the State in the king—was the more important and dangerous because at the same time, in the seventeenth and eighteenth centuries, the theory was developed of the omnipotence of the State. In the middle ages the State had been split up into a number of fixed and independent units, over which it exercised no decisive power. Now theory had rushed to the opposite extreme, and there was no political sphere which was free from State control. Even civil law and personal rights were regarded as a product of the State and subject to its pleasure.

Influence of theorists and clergy.

The political and legal theorists of the day are to a great extent responsible for the harm that resulted from this idea. The former busied themselves with finding plausible justification for the royal encroachments, while the latter made none of the opposition that their duty enjoined upon them. Quite as culpable were the court divines, whether Jesuits, high-churchmen, or orthodox Lutherans, who distorted the Christian idea that government has a divine basis, to represent the kings as the immediate vicegerents of God's rule upon earth, as in fact earthly deities. Because God is the supreme ruler of the world, which He has created and which He has filled and maintained with His Spirit, therefore kings are to be the supreme rulers of nations to which they have no such relations. As the Roman emperors loved to pose as deities, so Louis XIV delighted to play the part of Jupiter, but the representation was more suited to Pagan than to Christian times.

Decline of Absolutism

At the very period when this omnipotence was ascribed in theory and often put into practice, we find instances of kings who are completely powerless, who have sunk to be

the passive slaves of ambitious ministers or greedy mistresses. In such a system everything depended upon the personal character of the monarch[6]. Men of distinguished ability and energy, like Louis XIV himself before his powers were exhausted by pleasure and old age, could keep up at any rate the appearance of omnipotence, although even they could not remain fixed on so dizzy a height. But a weak prince, such as Charles II of England, Ferdinand VII of Spain, or Louis XV of France, handed over to others the despotic power that in theory was reserved for the Crown. Everywhere the people sank into indescribable misery. Any one who wishes fully to appreciate the effects of absolutism in civilised Europe should study the social history of Spain, Italy, or Austria, between 1540 and 1740[7].

Fortunately so many hostile traditions and institutions survived from former times as to prevent the complete and permanent development of a political principle which might be suited to the peoples of Asia, but was wholly alien to European life. The restored dynasty of the Stuarts sought in England, to emulate Louis XIV, and James II attacked not only the ancient and chartered rights of Parliament, but also the more recent constitution of the Church. The result was the expulsion of his dynasty from the throne: and the elevation of William of Orange, the greatest statesman and prince of his time, led to the firm foundation of the modern representative system.

The double and decisive overthrow of absolute monarchy

[6] 'Unlimited power corrupts the possessor; and this I know, that when law ends, there tyranny begins;' speech of Lord Chatham (quoted in Brougham, *Statesmen of the Time of George III*, i. 37). Guizot, *Essais*, p. 245: 'C'est le vice de la monarchie pure d'élever le pouvoir si haut que la tête tourne à celui qui le possède et que ceux qui le subissent osent à peine le regarder. Le souverain s'y croit un dieu, le peuple y tombe dans l'idolâtrie. On peut écrire alors les devoirs des rois et les droits des sujets; on peut même les prêcher sans cesse; mais les situations ont plus de force que les paroles, et quand l'inégalité est immense, les uns oublient aisément leurs devoirs, les autres leurs droits.'

[7] Laurent, *Études sur l'Histoire*, xi. 136: 'Si la révolution avait besoin d'une justification, elle la trouverait dans l'incompatibilité radicale de la monarchie absolue avec le droit et par suite avec les intérêts de l'humanité.'

in other countries.

in England was not immediately fatal to this institution in the rest of Europe. But all confidence in it was shattered, and it gradually advanced towards ruin. Its principles were rejected by the liberal philosophy of the eighteenth century. In the person of Frederick II, this philosophy ascended the throne of a rising State, and thence proclaimed the maxim that the king is not the proprietor of the land, nor the lord of the people or State, but 'the first servant of the State[a].' The principle of absolute monarchy was fatally weakened before the French Revolution, and was in no condition to withstand the storm. In spite of numerous fluctuations it finally perished in all the civilised states of Europe as the people became conscious of their freedom.

Russia.

It is only in Russia that absolute monarchy survives to our own day[b]. Religious sentiments are stronger in the East than in the West, and the immense size of the country and its comparative want of civilisation require a strong central government. The greatest reforms, such as the enfranchisement of the serfs by Alexander II, in 1858, could never have been accomplished except by the decisive will of the emperor. They would hardly have been called for by the aristocracy, and a free and cultivated burgher class does not exist as a political or social power. The lower classes are not wanting in ability to manage their own affairs in their villages and business associations, but are incapable of taking any important part in politics or legislation.

[a] [Hegel (*Geschichte der Phil.* ii. 195) calls Frederick the 'philosopher-king' (in the sense of Plato's *Republic*) not because, as a private person, he dabbled in Wolffian metaphysics and French philosophy, but because he made the welfare of his State a *principle* in his government against particular rights, &c. Cp. Hegel's *Philosophy of History*, Eng. trans. p. 460.]

[b] 'The Russian laws call the Czar an 'independent and absolute sovereign,' and base his power expressly upon divine command: 'God Himself orders men to submit to his supreme authority, not only from fear of punishment, but as a religious duty.' Legislation belongs exclusively to the Czar, though he usually takes the advice of his Council. *Sammlung der russischen Reichsgesetze* (Swod), Bd. i. Sect. 1. Art. 1. Foelix, *Revue Étrangère*, iii. 700.

CHAPTER XIV.

VII. Constitutional Monarchy.

A. *Its Origin and Progress.*

Constitutional monarchy is the fruit of modern times but its germ is to be found, as was pointed out by Montesquieu, in 'the forests of ancient Germany.' The first great but immature step towards the creation of that form of state which we now call constitutional, was taken when German princes established themselves upon Roman soil, when Roman political ideas were brought into contact with German rights. Rise of Constitutional Monarchy.

Then followed the period of feudal monarchy and of the limitation of the royal power by a strong aristocracy. The unity of the State was lost, the welfare of the people was neglected, and the king had no power proportionate to his dignity. Then the national tendency to unity revived, and the German feudal State was again illuminated and fertilised by the political principles of Rome. The people began to move at the same time, but the princes anticipated them, and seized the iron sceptre of absolute power. Classes began to struggle with each other and with the princes. As the middle ages came to an end the modern constitution of the State was close at hand. It is the end of a history of more than a thousand years, the completion of the Romano-Germanic political life, the true political civilisation of Europe.

This form of State was first developed in England, where I. In England.

it had long been slowly but surely ripening. In no European country did the monarchy retain so much power in the middle ages as in England, but nowhere were the rights and liberties of the nobles and the people so courageously defended and so securely founded.

English Revolutions.

But the English were not spared the fevers of political strife. Two great revolutions threatened the whole edifice of the State with ruin. The first, in the middle of the thirteenth century, was the attempt of the barons to take the government from the king into their own hands. This was the object of the Provisions of Oxford in 1258, which were forced upon Henry III by Simon de Montfort[1]. In the second, which arose in the seventeenth century from Charles I's struggle with the Long Parliament, both monarchy and aristocracy were for a time swept away by the fanatical party of democratic Puritans.

But on both occasions the disease did not last long enough to permanently weaken the body politic, and though the external symptoms were bad enough, it had not sufficient internal strength to give an alien direction to the national life. Both times England quickly recovered from the shock, the connexion with the past was never broken, and the national development remained organic and normal. Both revolutions resulted in distinct progress. From the first is to be dated the summoning of town representatives to parliament, the origin of the later House of Commons. The second was completed by the foundation of the new constitutional monarchy in 1689, which is henceforth a national institution[2].

[1] Guizot, *Essais*, p. 388. [The Provisions of Oxford, which established a very temporary system of government and which had nothing directly to do with the origin of town representation, have hardly the importance which Bluntschli attributes to them. A far greater date in the history of constitutional government is the year 1399—when a revolution placed the House of Lancaster upon the throne—to which he makes no allusion.]

[2] For a general view of the results of the Revolution of 1688, see Macaulay, *History of England* (Popular Edition), ii. p. 240; Gneist, *Engl. Verf.-Gesch.* 628–724.

Constitutional monarchy is a combination of all other forms of State. It preserves the greatest variety without sacrificing the harmony and unity of the whole. While giving free room to the aristocracy to exercise its powers, it imposes no restraint upon the democratic tendencies of the people. In its reverence for the law we can even see an ideocratic element. But all these various tendencies are held together in their due relations by the monarchy, the living head of the State organisation.

Characteristics of Constitutional Monarchy.

Constitutional monarchy in England has its stages of development. The following belong to the time of William of Orange:—

Results of the Revolution of 1688.

1. Absolute monarchy was rejected as an unconstitutional encroachment, to which resistance was justifiable.

2. In opposition to the mystical conceptions of orthodox theologians who revered the royal rights as divine, these rights were declared to be human and limited by the constitution[3], just as much as the rights of the Lords and Commons in Parliament, or the personal liberties of every Englishman.

3. The Declaration of Rights (1689) authoritatively formulated and secured the rights of Parliament and the liberties of the nation. The union of this declaration with the settlement of the succession made it impossible for the monarchy in the future to sever itself from these rights and liberties.

4. The irresponsibility of the king was declared to be a rule of the constitution, but the expulsion of the Stuarts proved clearly that exceptions could be made to the rule, if king and people came into irreconcileable collision.

5. Ministers were made responsible to Parliament, the

[3] Act of Settlement, 1700, art. iv. *Statutes of the Realm*, vii. 638 [quoted in Stubbs, *Select Charters*, 528–31]: 'Whereas the Laws of England are the birthright of the people thereof, and all the Kings and Queens, who shall ascend the Throne of this realm, ought to administer the government of the same according to the said laws, and all their officers and ministers ought to serve them respectively according to the same,' etc.

Commons having the right of accusing, the Lords of trying them.

Other rights of Parliament were recognised, viz.:

(6) to share in legislation,

(7) to grant taxes and to regulate the royal household,

(8) to control the executive government.

(9) The judicial administration, based upon the sworn juries selected from the people, was made completely independent and its powers extended.

(10) Freedom of the press and of political meetings was granted, so that public opinion could criticise and control the government.

The Hanoverian kings found it difficult to understand these principles and their consequences, but circumstances were too strong for them to refuse their recognition of the free constitution. In our own day the influence of Prince Albert induced the royal family to become unreservedly constitutional, and thus the monarchy has lost neither respect nor power, while it has thrown off the prejudices of dynastic tradition, and has become a truly national monarchy (*Volkskönigthum*).

The English king has realised that he does not represent his own will, but that of the State. Thus the ministers and —since the English ministers are kept in power by the confidence of Parliament, or rather of the House of Commons— the popular representatives have more influence over the government than in continental states. So far the English monarchy may be called parliamentary or republican. But the reverence for the crown is nowhere stronger than in England; and however strong the aristocratic elements and the Parliament may be, the English constitution has remained a monarchy[4].

[4] [Bluntschli here quotes passages from Burke and Sir Robert Peel to prove the importance of the royal power. It is hardly necessary to remind English readers that our constitution is a monarchy only in the popular, and not in a scientific sense. For the real functions of the crown in England, see Bagehot, *English Const.* pp. 33–88.]

II. France. Constitution of 1791.

The second grand effort to introduce a constitutional monarchy was made by the French. The constitution of 1791 was intended by its authors to be a masterpiece directly deduced from modern political principles. But the principles of the Constituent Assembly were rather republican and democratic than monarchical. Its members were influenced, not so much by the English constitution, as by Rousseau's theories of the sovereignty of the people and of the two powers, and by the constitutional democracy of America with its three powers, each independent, but held together by the unity of the sovereign people. The constitution of 1791 was essentially democratic: its monarchy was alien to the system, a survival from the past with which on all other points the Revolution had completely broken.

The First Empire.

Napoleon revived the monarchical power and raised the nation from the mire into which it had sunk. The central authority was once more concentrated in his strong hand. The Revolution was still recent, and the country required a strong dictatorship to carry it through the European war. But he was too energetic a ruler to give France a new constitutional monarchy, and the times were not suited to such an experiment. Yet he allowed some rude approaches to it. He recognised the people as the source of his power, and he opened to all Frenchmen the way to honour and advancement. He sought to create in the Senate a new aristocracy which, as he said, 'should protect the sovereignty, while the democracy elevates to the sovereignty[5].' If his dynasty had been peaceably prolonged, a national constitutional monarchy might in time have been founded upon these beginnings. But to Napoleon himself the political rights of the other corporations were displeasing as limitations upon his absolute will, and his fall involved all his institutions in the same ruin.

[5] Las Casas, *Mém.* iii. 32. Compare above, Book ii. ch. 10. The best description of the ideal Napoleonic state, an ideal which was never practically realised, is to be found in the *Idées Napoléoniennes*, written by Louis Napoleon in 1839.

The Charter of 1814.

The Charter of Louis XVIII (4 June, 1814) was in its essence a compromise between the old dynasty which returned from exile and the French people which had witnessed the Revolution and the rule of Napoleon, a compromise between the claims of the old monarchy and the new principles of government, between legitimacy and the revolution. In form it was a *free gift* of the king, and emanated from his exclusive authority[6]. It contained other contradictions besides this, but at the same time it was better than the previous attempts to realise a constitutional monarchy in France.

While the forms of the English constitution had been apparently copied, the spirit was altogether different. Greater power was allowed to the French than to the English king, or rather, as the Charter professed to be issued by the absolute authority of the monarch[7], his power was less limited. But the French monarchy was much less secure than the English, not only because the character of the people was more unstable and prone to change, but because the Revolution had destroyed the aristocracy and had trained the whole people in democratic opinions and tendencies.

The peers (*pairie*), who shared the right of legislation with the crown and formed a supreme court for political offences, were to be 'a truly rational institution, uniting the recollections of the past with the hopes of the future, the old *régime* with the new.' But in reality the new nobles of Napoleon's time were put too much in the background, and the old decaying aristocracy was too generously treated. The hereditary peers were very inferior to the English House of Lords, and could never be regarded as a permanent or 'truly national institution.' The Chamber of Deputies was to replace 'the old assemblies of the *Champs de Mars* as well

[6] See the preamble: 'Nous avons volontairement et par le libre exercice de notre autorité royale accordé et accordons, fait concession et octroi à nos sujets . . . de la Charte constitutionnelle qui suit.'

[7] 'Bien que l'autorité toute entière résidât en France dans la personne du Roi.'

as the third estate of the States General.' But it was really a pure plutocracy, and was employed for the profit of the official class. The mass of the citizens, who were wealthy and civilised and had played an important part in the revolutionary period, could neither elect nor be elected. The peasants, to whom the Revolution had given free property and even political rights, were equally excluded, while the lower classes were wholly disregarded. The *demos*, now a great political power in France, was not likely to support a constitution which left it entirely unrepresented.

The Revolution had strengthened two conflicting tendencies, that towards centralisation and that towards the extension of democracy. If carried to extremes, the one led back to absolute monarchy, the other to revolutionary anarchy. The Charter sought to strengthen and control the former, and thus to restrain the latter tendency[z].

The Charter survived the first popular storm, which was roused by the absolutism of Charles X and by the revolutionary press. The party cry of Louis Philippe and of the July Revolution of 1830 was that 'the Charter should be a reality.' But the hereditary was replaced by a life peerage, and the basis of the Chamber of Deputies was enlarged, though it retained its plutocratic character[a]. Revolution of 1830.

Then came a second storm, of which no one had foreseen the violence, and in February, 1848, the whole constitution, though better than what followed, and though containing in itself the capability of improvement, was overthrown in Revolution of 1848.

[z] De Tocqueville, *Democracy in America* (trans. by Reeve), i. 93: 'In the French Revolution there were two impulses in opposite directions, which must never be confounded—the one was favourable to liberty, the other to despotism. . . . The Revolution declared itself the enemy of royalty and of provincial institutions at the same time; it confounded all that had preceded it—despotic power and the checks to its abuses—in indiscriminate hatred, and its tendency was at once to overthrow and to centralise. This double character of the French Revolution is a fact which has been adroitly handled by the friends of absolute power.'

[a] [The qualification for a vote was lowered from 300 to 200 francs of direct taxes. Even after this the number of electors was less than half a million, and this limited franchise was a prominent cause of the failure of the Orleanist monarchy.]

one day, the majority being too surprised and stupefied to resist a desperate minority. For the second time the *demos* sought to rule France.

The representative democracy of the first Revolution was restored with a President of the Republic; but his authority was seriously checked and limited by the National Assembly, which was divided by bitter party passions, and wasted its strength in endless debates. The popular instinct, however, turned again to monarchy, and a second Napoleon became the conqueror and the heir of the democracy. Louis Napoleon seized upon the administration, and justified his action by the consent of the vast majority of Frenchmen.

The Second Empire.

The constitution of the new Empire (1852) recalled rather the Roman than the English state. In fact, the Napoleonic ideas had a distinctly Roman character, and thus commended themselves to the Romance element of the French[9]. Homage was paid to the majesty of the people as the source of all political power; the constitution was subject to its consent; the Legislative Body depended upon its approval; even the imperial power was derived from its will[10], and the Emperor was responsible to the popular voice. Democratic equality, so dear to the masses, was unreservedly recognised in the right of universal suffrage. Upon this broad basis the imperial power was raised to majestic dignity. The initiative in legislation, the supreme control of politics, diplomacy, the army and the official body, were placed in the Emperor's hands. Even the members of the council of state could be dismissed at his pleasure. The constitution recognised only two great powers—the majority of the people and the Emperor. All that stood between them had the merest shadow of independence. Ministers were responsible only to the head of the State, but some of them were merely orators

[9] The constitution of 1852 bore an external resemblance to the Napoleonic constitution of the year VIII (1801), but the differences were really considerable. De Parieu, *Pol.* p. 201.

[10] Napoleon III's title ran: 'par la grâce de Dieu et la volonté nationale Empereur des Français.'

employed to defend the government in the Chamber, and these men sometimes obtained an influence dangerous not only to the representatives but also to the Emperor [11]. The power of the Legislative Body was negative rather than positive; it might reject but it could not improve a harmful or unjust law; it had no initiative, and could only confer with the Council of State about proposed changes by means of commissions. The Senate was professedly created to defend popular liberties, to maintain the constitution, and in exceptional cases to take the initiative in proposing reforms. But it was by its nature aristocratic, and its members were compelled to adhere to the Emperor, partly by the fact that they owed their dignity to him, and partly by the social and party relations of France. The chief object of the government was to maintain harmony between the Emperor and the masses, and therefore very scanty liberty was allowed to opposition either in the chambers or in the press [12].

This autocratic constitution failed to satisfy the revived desire for popular liberty. Napoleon III was compelled to make concessions in the direction of constitutional monarchy [12a]. A senatorial decree (Sept. 1869) granted to both Houses the right of initiation, allowed ministers to become members of them, and made the latter responsible to the Senate. These changes were submitted to the people, and approved in the *plébiscite* of 1870 (20 April) by 7,350,142 votes to 1,538,825.

Revolution of 1870.

But these concessions failed to save the constitution in the crisis which was brought about by the collapse of Napoleon's policy and of the French army in the war with Germany. A new revolution in Paris (4 Sept. 1870)

[11] De Parieu, *Pol.* p. 204, who alludes to M. Rouher, but without mentioning his name.

[12] In the *Rêveries Politiques* of Louis Napoleon, which were written as early as 1832, is to be found a sketch of a French constitution, which bears the same relation to the constitution of 1852 as the ideals of youth to the ripe judgment of manhood.

[12a] These concessions commenced with the decrees of Jan. 19, Feb. 5, March 14 and 23, 1867.

abolished the Empire and again tried the experiment of a Republic[b].

III. Romance Countries.

The changes experienced by France in the revolutionary period and afterwards exercised an important influence upon other, and especially upon the Romance, countries. In Italy the victorious arms of the French established republics on the model of their own; and afterwards Napoleon I erected vassal kingdoms both in Italy and Spain which were copies of the French empire. It seemed as if the constitution of modern Europe was to be dictated from Paris, but the fall of Napoleon's supremacy was immediately fatal to his ephemeral creations.

More important in the development of constitutional monarchy, though also of only short duration, were the constitutions proclaimed in 1812 in Sicily and Spain.

1. Sicily.

The constitution of Sicily, which was mainly the work of Lord William Bentinck, was naturally modelled upon that of England. At the same time the aristocratic traditions of the Norman period were made use of, and the modern theory of the division of powers was more clearly recognised than in England. The legislative power was given to the Parliament, which, however, included only the two Houses without the king. The king had to confirm laws, not as a part of Parliament but as a separate and external power[12]. The Chamber of Peers consisted of the Sicilian barons and prelates. The secular peers were hereditary, but the king could create new peers among nobles who possessed a net revenue of 6000 francs. The Lower House consisted of representatives, and a very small income was sufficient qualification for the suffrage or a seat.

The executive power rested with the king, but his ministers and privy councillors were responsible to Parliament for its exercise. In all important matters the king was

[b] [The existing French constitution was drawn up by a National Assembly in 1875 (25 Feb.). For an analysis of it see Demombynes, *Les Constitutions Européennes* (Paris, 1883), ii. pp. 1–166.]

[12] Articles 1, 2, and 14. A German translation of the constitution appeared in the *Portfolio* for 1848.

bound to consult his Privy Council, and in some, e.g. the bringing of troops into Sicily, the appointment of foreign officers, the creation of new magistracies, or the granting of pensions for political services, he had to obtain the consent of Parliament.

The judicial power was exercised in the king's name, but 'only by the officials fixed by the law.' Each Sicilian was allowed to resist any illegal restraint; the censorship, except for theological works, was abolished; feudal rights were suppressed, etc.

It is obvious that this constitution was an imitation of English forms, with a certain admixture of the theories put forth in the French constitution of 1791. The republican element preponderated in both, but in Sicily the contrast with monarchical tradition was the more marked because the absolutist court of the Bourbons could not endure the constitution, and the quarrel between the clericals and the Jacobins was fought out with all the heat and frenzy of the southern character. When Naples was restored to the king, he felt himself strong enough to revoke the constitution which he had sworn to observe, and to restore absolute government. But this first effort to combine the political forms of England with the theories of the French Revolution, and thus to form a new constitutional system, remained a model for many subsequent attempts in the same direction.

2. Spain.

Similar theories about the constitutional State and the division of the three powers inspired the very complete constitution which was issued by the Spanish Regency (March 19, 1812) at a time when the king was a prisoner, and great part of the country was in the hands of the French. It took as its model the French constitution of 1791, and proclaimed the principle that the people is sovereign (Art. 3), but at the same time it allowed very extensive rights to the king. Legislative power was entrusted to the 'Cortes combined with the king' (Art. 15), and the latter was also charged with the 'supervision of justice' (Art. 171). But reiterated

votes on the part of the Cortes could compel the king to sanction a law. The Spanish constitution differed very essentially from the English, because it did not admit an intermediate Chamber of Peers, but placed the king face to face with one assembly of national representatives, the Cortes [14]

In spite of its defects and the want of enthusiasm with which it was received, this constitution became popular after its arbitrary abrogation by the restored king, Ferdinand VII (May 4, 1814), and several attempts were made (in 1820 and 1836) to restore it by force. The *Estatuto Real* of 1834, which gave Spain a representative government, was insufficient to satisfy the people. In 1836 the Queen-Regent, Christina, was compelled to recognise the constitution of 1812, and in the next year the influence of the progressist party obtained the formal sanction of a new constitution based upon that of 1812, with partial modifications taken from the *Estatuto Real.* This recognised the king's right to sanction laws without limitation, and established two houses, a senate and a chamber of deputies [15]. A revision of the constitution in 1845 (May 23) by the moderate party (*moderados*) brought it nearer to the French Charter of 1830 [16].

Even this did not terminate the constitutional struggles, and the country continued to be tossed alternately by clerical reaction and radical anarchy, by court intrigues and military dictatorships. The misrule of the bigoted Queen Isabella brought about a new revolution in 1868, which expelled both the Bourbons and the Jesuits. For a long time the monarchical party looked round in vain for a king, until in 1870 the duke of Aosta, second son of the Italian king Victor Emmanuel, accepted the offered crown as Amadeo I.

[14] A German translation of the constitution is to be found in Pölitz, ii. 263 ff.; and in Schubert, *Verf.* ii. 44 ff. Comp. Gervinus, *Geschichte des XIX. Jahrhunderts*, ii. 135 ff.

[15] Bülau, *Europ. Verf. seit* 1828, p. 221.

[16] Schubert, *Verf.* ii. 105 ff. and 116 ff. [See also Laferrière et Batbie, *Constitutions d'Europe et d'Amérique*, p. 474.]

For a time there seemed a favourable prospect for constitutional government, but before long the king was disgusted by the ceaseless conspiracies, and abdicated of his own accord (February 11, 1873). Soon afterwards the military party seized the government, and prepared the way for the restoration of constitutional monarchy with the young Alfonso XII, who was proclaimed king on the 1st of January, 1875. Meanwhile the Bourbon claimant, Don Carlos, supported by the priests and the legitimists, had been striving to assert his hereditary rights in the northern and Basque provinces, with no result except to increase the misery of the people. In 1876 a Cortes was summoned to draw up a new constitution, which was approved by King Alfonso on the 30th of June. According to this the nation was to be represented by a Senate, of which the members were partly senators by right, partly nominated by the king, and partly elected (Electoral Law of February 8, 1877, and by a Chamber of Deputies (Electoral Law of December 28, 1878)[c].

3. Portugal.

The Spanish constitution of 1812 was imitated in the Portuguese constitution of 1822, which, however, was never fully recognised. In 1826 Don Pedro, to strengthen the position of his daughter Donna Maria da Gloria, drew up a new constitution, which better preserved the monarchical principle, and also, following England and the French Charter, added to the Chamber of Deputies a house of hereditary and life peers. This constitution recognised four powers: (1) the legislative power, belonging to the Cortes under the sanction of the king; (2) the mediating power (*moderador*), held by the king, 'as the supreme head of the nation, to maintain the balance and harmony of the other political powers;' (3) the executive power, in the hands of king and ministers; (4) the judicial power, entrusted to independent courts[17].

[c] [For an analysis of this constitution, see Demombynes, i. 398 ff.]

[17] Articles 11, 13, 71, 75, 118 of the Constitution of 1826. Both constitutions are given in Pölitz, ii. 299 ff.; the latter in Schubert, *Verf.* ii. 148. [See also Laferrière et Batbie, p. 488.]

Even after the victory of Don Miguel and the absolutists who would have nothing to do with either constitution, two parties continued to strive with varying success, the democrats for the constitution of 1822, and the 'chartists' for the charter of 1826. In 1838 the latter constitution was revised, and hereditary peerages and the council of state were abolished [18]. The mass of the people took little part in these changes of institutions. Nevertheless, under the influence of the modern Coburg dynasty, political conditions have developed more successfully and peaceably in Portugal than in Spain [4].

4. Brazil. Constitutional monarchy made its way from Portugal to Brazil, which became independent of the mother-country in 1822, and there underwent the same struggles and the same alternations of fortune, but also made the same progress, as in Europe. [The monarchy was overthrown in 1889.]

5. Italy. It took a long struggle to free Italy from the degrading yoke of absolute rule. Although the Napoleonic kingdoms of Italy and Naples had been nothing more than limited autocracies, the absolutism of the restored Bourbon and Hapsburg princes was endured with impatience by the people. Secret conspiracies and open revolts struggled against the cruel reaction, and were only put down with the help of foreign arms. When the king of Naples agreed in 1820 to grant his subjects the Spanish constitution of 1812, Austrian troops at once stepped in to restore the old despotism. The movements between 1830 and 1840 were equally futile, as the massive power of Austria, on which the dynasties leaned for support, was always ready to suppress any attempt at constitutional government.

It was only after 1840 that the spirit of reform obtained greater strength by allying itself with the national desire for freedom from foreign rule. In 1847 all Italy was roused, and the movement seemed to have the support of the new

[18] Schubert, *Verf.* ii. 173.

[4] [For the contemporary constitution of Portugal, see Demombynes, i. 487.]

Pope, Pius IX. Even before the outbreak of the Revolution in Paris, Ferdinand II in Naples, and Charles Albert in Piedmont, were compelled to establish constitutions. But the former hastened to destroy the work as soon as he could do so with safety, although he had sworn to maintain it 'in the name of the Holy Trinity[19].' The result of his treachery was that, when his son Francis II was urged by necessity to restore constitutional government in 1860, the people refused to trust him, and the dynasty was expelled.

In Piedmont matters went better. The House of Savoy adhered with rare determination to the constitution of the 4th of March, 1848, which Charles Albert had accepted on the model of the French Charter of 1830. It is true that Charles Albert failed in his design to form a kingdom of Italy under his sceptre. The victories of Radetzky checked his ambition, and perhaps preserved the peninsula from the flood of a premature democracy. But even in this period of reaction Victor Emmanuel remained loyal to the promise of his father. His wonderful successes in 1859 and 1860 were to a great extent due to the confidence which the Italians felt in his loyalty to the constitution and the nation, and in the great statesman, Cavour, whom he appointed to manage his affairs. French assistance drove the Austrians from Lombardy, the new national kingdom extended itself over the principalities of central Italy, and the bold campaign of Garibaldi added to it Naples and Sicily. With the help of Prussia Venice was annexed in 1866, and finally, in 1870, the Franco-German war compelled the French troops to evacuate Rome, and enabled the Italians to occupy their old capital. The German victories destroyed the last ecclesiastical State of Europe. The new Italian monarchy has remained firmly constitutional, and even the republican party followed the example of Garibaldi in recognising this form of government as best suited for existing conditions.

Belgium forms the transition from the Romance to the 6. Belgium.

[19] Proclamation of 8 Feb. 1848, in the *Portfolio*, i. 64.

German States. The Belgian constitution of 1831 was copied from the French Charter of 1830, but makes greater concessions to the burgher democracy. This is seen in the assertion that 'all powers are derived from the people' (Art. 25: one must remember that Belgium had no native dynasty, and was compelled to call in a foreign king), in the rejection of class distinctions (Art. 6), and in the wider suffrage. The system of two chambers is retained, but the Senate is elected only for a period of eight years, and the electors are the same as for the Chamber of Deputies, the only distinction being that a higher qualification of age and property is required for senators (the original plan was to give the nomination of senators to the king). Under the wise and statesmanlike rule of Leopold of Coburg, Belgium was very little affected by the crisis of 1848, and has since continued to increase in prosperity in spite of the passionate contests between the ultramontane and liberal parties[20].

IV. Teutonic countries outside Germany.

1. Sweden.

In Scandinavia the constitutional system has had a peculiar history. In Sweden, the Diet was composed in the sixteenth century of four estates, each with a separate vote, viz. the nobles and knights, the clergy, the citizens, and the peasants. The kings were often compelled to rely upon the two lower orders for support against the great power of the nobles, whose influence was chiefly exerted outside the Diet in the Council (comprising both the Council of State and the ministers). Gustavus III was the first to break through this preponderance of the nobles, which threatened both the existence of the crown and the security of the country, by opening (1789) political offices, except 'the highest offices of the State and the Court,' to non-nobles.

The Swedish constitution of the 7th of June, 1809[21], is a development from the earlier constitution of 1772[22]. The

[20] Theodor Juste, *Gesch. der Gründung der constitutionellen Monarchie in Belgien*, 1850, 2 Bde. [For fuller details of the Belgian constitution, see Demombynes, i. 236 ff. and for the complete text, Laferrière et Batbie, p. 66.]

[21] Schubert, *Verf.* ii. 368. [Laferrière et Batbie, p. 321.]

[22] Schubert, ii. 349.

functions of the Council of State and the four secretaries of State are regulated with much greater care and precision than in other modern constitutions, and the exclusive pretensions of the nobles to fill these posts are restricted. The estates remained until recent times four in number, and without their consent the king could neither change the constitution, issue laws, nor levy new taxes. As a rule a majority of three estates bound the fourth, but in the case of constitutional laws all the estates and the king must be unanimous.

In many points this constitution recalls the mediæval organisation of Germany. Although presenting many advantages it has found, outside Sweden, little attention and no imitators, mainly because the division of estates made it difficult to obtain a decisive expression of the national will. In 1866 the ordinary system of two chambers superseded the four estates [e].

2. Norway.

Far more democratic is the Norwegian constitution of the 4th of November, 1814. The Swedish king (Charles XIII), whom the peace made king of Norway also, was compelled by circumstances to accept the constitution which the Norwegians themselves had drawn up in the spring of 1814, to secure their personal freedom and independence. Legislation is the function of the people and exercised by the *Storthing* (Art. 49). The king has the right of sanction, but cannot reject a law which has been passed three times by the Assembly. The *Storthing* is chosen by the people (mostly landed proprietors), and then divides itself into two chambers, the *Lagthing* and the *Odelsthing*. The executive power belongs to the king, his ministers being responsible. Subsequent efforts to extend the royal power and to create a political aristocracy have all failed. The opposition of the free peasants and citizens to both changes has been the more vigorous because of the jealousy with which Norway has maintained its independence of Sweden [28].

[e] [*Rigdagsordnung u. Riddarhusordnung von* 22 June. 1866.]

[28] Schubert, *Verf.* ii. 404 ff. Comp. art. *Norwegen* in the *Deutsches Statswörterbuch*. [The constitution is to be found in Laferrière et Batbie, p. 372.]

3. Denmark. In Denmark the revolution of 1660 was directed against the nobles, and the assistance of the citizens made the monarchy absolute. It was not till the present century that constitutional government was introduced, at first in the incomplete form of provincial estates (law of 28th May, 1831[1], but made more democratic by the fundamental law of the 5th of June, 1849. The struggles of Danes and Germans have turned upon the difference of nationality rather than of constitution. In 1866 (28th July) a revision of the constitution was made by the king and the *Rigsdag* (composed of two chambers, *Landsthing* and *Folkething*)[1].

4. Holland. In the modern kingdom of the Netherlands, which replaced the old republic of the United Provinces and the later Napoleonic kingdom of Holland, constitutional monarchy was at once introduced (28th March, 1814, and after the union of Belgium by a new law of 24th August, 1815). The new constitution of the 14th of October, 1848, was an advance in the same direction, and the constitutional spirit has been lately strengthened in Holland.

V. German States. The Empire. The old 'Roman Empire of the German people' had become a powerless dignity in the last century of its nominal existence. All real power was in the hands of the princes, amongst whom the emperor only retained an influential position as Archduke of Austria and King of Hungary and Bohemia.

But in their own separate territories most of the princes had broken through the restraints imposed by their estates and had established absolute government. Their power, derived from imperial offices which had become hereditary, was, after mediæval fashion, half theocratic, half patriarchal. It was extended by the Roman conception of sovereignty, and acknowledged no restraints except the slight bond of obedience to the empire and the obligation to appear before the Imperial Chamber (*Reichskammergericht*) and the Aulic Council (*Reichshofrath*).

[1] [For the Danish Constitution, which was voted on Nov. 7, 1865, and sanctioned July 28, 1866, see Laierrière et Batbie, p. 399.]

The first State to establish this independent absolutism was Prussia. While Austria grew into a great European power almost outside the Empire, and became the rival of France, a new State arose in the north, and rapidly acquired strength in a contest with the mediæval empire, which was waged however in the spirit of German nationality. The Austrian and Catholic houses of Hapsburg and Lorraine rested for support upon the imperial dignity, traditional rights, the nobles, the clergy, and an army composed of various races; while the Protestant house of Hohenzollern became the representative and the champion of the national liberty and spirit of Germany. Rise of Prussia.

Frederick the Great (1740–1786) deserves to be reverenced as the father of constitutional monarchy upon the continent. If he had been better understood by the peoples and more imitated by the princes, the transition from the absolute to the constitutional form of State would have been much easier to accomplish. No one has more energetically contended against the doctrine that the king is the lord and master of his State; no one has more definitely maintained that monarchy is an office and the king only the chief servant of the State. The whole mediæval theory of divine right and proprietary rule he unhesitatingly rejected. That he neither revived the old constitution of the estates, nor created new representative institutions, is easily explicable by the fact that he was too far ahead of his subjects, who were not yet ripe for a share in the government. But he prepared the way for constitutional monarchy: (1) by carrying out the principle that the royal rights are duties to the State, (2) by his legislation (the *Preussische Landrecht*), and (3) by compelling all officials to discharge their political duties with zeal and fidelity.

The French Revolution led Germany astray from the path marked out by Frederick, as it made the princes timid and the people radical.

The constitutions which Napoleon's influence established in the States of the Confederation of the Rhine may to The Confederation of the Rhine.

some extent be regarded as marking the transition to constitutional monarchy. They cleared away the last remnants of the old estates, collected the fundamental laws into a single act, and gave a sort of representation, though despicable and powerless, to property, industry, and education.

The Confederation of 1815.

The desperate effort of the War of Liberation freed Germany from the foreign yoke, and offered a favourable opportunity for introducing the modern organisation in a national and liberal spirit. The few great statesmen that the country possessed, Stein, Humboldt, and at first Hardenberg, wished for such a change, and Frederick William III had publicly expressed himself favourable to it. But the absolutist sentiments of the German dynasties and of the noble and official classes were too strong, the Revolution had inspired an overwhelming mistrust of all modern ideas, and the political education of the people was still very immature. Both the German confederation and the sovereign states which composed it retained absolute government, only slightly limited by recollections of the provincial estates. The 13th article of the Act which constituted the confederation, declared that 'in all States of the Confederation there shall be a constitution of local estates' (*landständische. Verfassung*), but the Austrian statesmen expressly provided against any interpretation of this phrase to imply a 'representative or constitutional monarchy.'

Constitutions after 1815.

It was quite exceptional when a few states established a kind of constitutional monarchy in imitation of the French monarchy, but modified by survivals of the old provincial estates. The lead was taken by the Duchy of Nassau (2 Sept. 1814), where the constitution was very short-lived, by Luxemburg (24 August, 1815), and notably by Saxe-Weimar-Eisenach, which presented the rare spectacle of a prince, Karl August, personally inclined to free institutions.

More important was the action of the Southern States—Bavaria (26 May, 1818), Baden (22 August, 1818), and

Würtemberg (25 September, 1819)—where the far-sighted government had first to put down the opposition of the old estates. These States adopted constitutional government from politic motives, in order to strengthen themselves against the greater States which were despotically ruled.

Their example was followed by the Kingdom of Hanover (17 Dec. 1819), the Grand Duchy of Hesse (17 Dec. 1820), and Saxe-Meiningen (23 August, 1829).

All these constitutions gave ample powers and rights to the king. In fact, monarchy was more secure among the conservative Germans than in France, and as long as it understood and followed the advance of liberal ideas, was allowed the management of public affairs with more confidence than was felt elsewhere.

The arrangement of the chambers was copied from the English and French models. But the upper chambers, composed for the most part of the landed nobility (*Grundadel*), whose claims and ideas belonged to the past, with the addition of a few officials dependent upon the court, could never acquire sufficient respect and authority. The lower chambers were less plutocratic than in France, but as they followed the lines of the old estates, they were often declared to be 'class rather than representative' institutions. This, however, is unfair. The distinction between the mediæval organisation of estates and the modern representative government is not that the latter does not recognise the difference of estates among the people, but that it is *national*, and lays stress rather upon the unity of the nation and the State than upon the special interests of the classes that compose the nation. Now this modern principle is expressly recognised, for example, in the Bavarian Constitution, which calls upon the deputies to swear that they will 'consult for the general welfare of the whole land without regard to separate estates or classes.'

The development of constitutional monarchy was hindered for many decades by the distrust and hostility of the governments of the two great States of Germany. In

Prussia all efforts at reform failed, and instead of the promised representation of the people, only provincial estates were granted. The Austrian Government believed that absolute government was the only means of maintaining the unity of its various provinces. The German Confederation directed all its activity to maintain the so-called 'monarchical principle,' and to establish a police supervision over the people.

New movements after 1830.

The French Revolution of 1830 led to new movements in Germany, and impelled a number of States to introduce the constitutional system. The electorate of Hesse received a constitution (5 Jan. 1831) which was devised to protect popular liberties against the despotism of the prince. In Saxony a constitution was modelled upon that of Bavaria (4 Sept. 1831); and Hanover obtained a new fundamental law (26 Sept. 1833), which was, however, rejected by the next king, Ernst August, and only restored in 1840 in a modified form.

Thus, in spite of the hostility of the two great States, constitutional government steadily advanced in Germany, although it was often more formal than real, and suffered much from an officious bureaucracy and from the conflicts of parties both within and without the assemblies.

Prussia.

At last, on the 3rd of February, 1847, Frederick William IV issued a patent creating a common *Landtag* for Prussia on the basis of the old provincial estates. This assembly received the right of advice in legislation, of consent to new taxes, and of petitioning about internal affairs. Thus Prussia stepped from the class of absolute to that of limited monarchies, and began to draw nearer to the representative states of Germany. The impulse had been given to the introduction of the modern system, and the constitution was the stronger for preserving the connexion with existing relations instead of simply copying the ordinary forms of constitutional government. Although the rights of the *Landtag* were miserably insufficient, progress had become possible, and the defects of the constitution might be

removed as the people advanced in political education. Unfortunately the government was so hostile to the legitimate wishes of the *Landtag* that it lost the confidence even of the moderate parties. When Europe was shaken by the political earthquake of 1848, the new edifice collapsed. On the 5th of October, 1848, a new constitution was drawn up, which was mainly the work of the democratic and revolutionary party. Six months later the king issued an electoral law (30 May, 1849), which led to the drawing up of the revised constitution of the 31st of January, 1850[24]. Since that date many important changes have been made, mostly in the direction of strengthening the central authority. Although the constitution had many and serious defects, it has furnished a legal basis for political life in Prussia.

The events of the next few years proved that the spirit of the constitution had not been so generally accepted as the form. Dissatisfaction was shown by the upper house (*Herrenhaus*), which was composed of the representatives of absolutism and of mediæval chivalry. The monarchy, accustomed to unchecked power, found it hard to accept its altered position. It was only gradually that the popular representatives (*Haus der Abgeordneten*) became conscious of the limits of their power and of the great gulf which separated the Prussian government from the parliamentary system of England. But during the obstinate and bitter struggles between reform and reaction, between authority and liberty, the constitution took deeper and deeper root, and hostilities gradually gave way to the sense of duty towards the State. In the fire of the war of 1866 with Austria all the elements of opposition were fused into unity.

Austria was also taken unawares by the Revolution of 1848. The various peoples, who had hitherto been held together by the Hapsburg dynasty, now struggled for separation, and Vienna was for a moment in the hands of youthful

Austria.

[24] The text is to be found in Zachariä, *Die deutschen Verfassungsgesetze der Gegenwart*, p. 74 ff. [See also Laferrière et Batbie, p. 138.]

and inexperienced enthusiasts. Unity disappeared everywhere except in the army, the last bulwark of the monarchy. The victories of the army enabled the Austrian statesmen to recover the reins of government, and under the pressure of internal and external dangers, they undertook to reconstruct a new and more united State. The constitution which was granted on the 4th of March, 1849, was the first attempt to organise the Austrian empire upon the principles of constitutional monarchy. But the experiment was never put into practice. It seemed impossible to unite in a single assembly peoples which varied so completely both in race and in civilisation; and the revolt of Hungary made it more essential than ever to retain a dictatorial and united government. As the ruling dynasty had always been the connecting link between the Austrian provinces, it was thought best to concentrate all powers over the State in the hands of the emperor. An imperial patent (20 August, 1851) declared ministers to be responsible to the sovereign alone; by a cabinet decree of the same day the imperial council (*Reichsrath*) was transformed into a crown council; and by another patent (31 Dec.) the constitution of 1849 was suppressed. A decree of the cabinet (31 Dec.) promised the erection in the crown lands of deliberative committees composed of the nobles, lesser landowners, and industrial classes[35]. But in reality absolute monarchy was restored with a machine-like body of officials to carry out its will, with a moral support in the Catholic clergy, and a material support in the strong army.

After 1858 absolutism suffered a series of defeats in Prussia, Bavaria, Baden, Würtemberg, the electorate of Hesse, &c., and in the Italian war of 1859 Austria discovered the powerlessness of her three props, the bureaucracy, the army, and the clergy. Again the imperial government saw no way of escaping from its financial and political difficulties except in granting a representative constitution. In an imperial diploma of the 20th of October,

[35] Zachariä, p. 62 ff.

1860, this resolve was announced, and an attempt was made to carry it out in the Fundamental Law of the 26th of February, 1861.

According to the diploma the powers of the monarchy were to be brought into harmony with 'the consciousness of historic rights in the various kingdoms and provinces.' Each people was to have its own *Landtag* with partial autonomy, and at the same time all were to co-operate in the general *Reichstag* both in legislation and in controlling the imperial government. There were to be two *Reichstags*, one for the whole monarchy, the other for the western provinces. This constitution, however, had only a tentative existence, as the Hungarians refused to send deputies to the *Reichstag*.

An imperial declaration (20 Sept. 1865) suspended the action of the *Reichstag* and again freed the government from its control. But the disasters of 1866 brought about a new change. After the defeat of Königgrätz [or Sadowa] and the treaty of Prague with Prussia, earnest negotiations were carried on with Hungary, which steadily refused to give up its ancient rights, or to exchange them for a Constitution that was merely a gift from the emperor. At last they agreed to make peace on condition that the legal continuity of the Hungarian Constitution should be acknowledged, that the laws of 1848 and the independence of their kingdom should be preserved, and that all the encroachments that had been attempted should be declared null. This was virtually the restoration of dualism. Henceforth there is a Reichstag and a ministry for Hungary, and another Reichstag and ministry for the Austrian provinces on this side of the Leitha. A series of laws from 1867 onwards organised the responsibility of ministers, the method of representation, the judicial and civil administration. The suspended constitution, so far as it was applicable, had to be revived. The two Diets appointed a joint assembly ('delegations') which was to act with the three common ministers, viz. those of finance, war, and

foreign affairs, in arranging a general policy for the whole empire. It is doubtful whether this compromise will be permanent, but it is certain that neither Austria, Hungary, nor Bohemia would tolerate a return to absolutism, and that, though they may differ as to forms, they are unanimous in the desire for a constitutional monarchy which shall secure influence and control to the national representatives.

Proposed German Constitution of 1849.

The attempt to extend constitutional forms from the individual states to the German Confederation led to the drawing up of a constitution (28 March, 1849) which was to embrace all the German states except Austria. The Prussian kings were to be hereditary emperors; each state was to be represented in a federal senate (*Statenhaus*), and the German people were to send deputies to a national assembly (*Volkshaus*). But the scheme was never carried out. Austria prepared for war rather than accept such a solution of the German question; the king of Prussia would not accept the imperial crown from the hands of the national assembly; Bavaria refused its adhesion; and the nation itself was not sufficiently decided. Dynastic and separatist influences were stronger than the sense of national unity, and were able to foil all later efforts, especially those of Prussia, to unite Germany more closely under a constitutional monarchy. The war of 1866 was necessary to overcome the obstacles interposed by Austria and the ruling dynasties.

North German Confederation, 1867.

The North German Confederation (16 April, 1867) can only be called a constitutional monarchy with considerable reservations. The direction of a common policy was entrusted to the Prussian king as hereditary President and General of the Confederation. He was aided by a Federal Chancellor, named by himself but responsible, who was the head of a Chancery for carrying out the administration. The executive power, therefore, resembles that in a constitutional monarchy. On the other hand, the President was checked, not only by the *Reichstag*, containing repre-

sentatives of the German nation, but also by the Federal Council (*Bundesrath*), in which the governments of the allied States had seats and votes.* These two bodies exercised the legislative power and controlled the federal administration.

The constitution of the German Empire (16th April, 1871) strengthened the monarchical element by the addition of the imperial title. But even in the present day the Emperor has only a limited right of veto in the case of certain military and financial measures; he has no independent and direct share in legislation; and the Federal Council (*Bundesrath*) is not merely a legislative senate, but a joint ruler of the empire. To some extent, therefore, there is a *collective government* of the various princes and local rulers, and this is more like an aristocracy than a monarchy. The mixture of principles in the Empire, which Puffendorf declared to be monstrous two centuries ago, has not yet been fully cleared up. But in spite of peculiarities and inconsistencies the constitution of Germany has shown both force and vitality, and if monarchical power and unity, with the recognition of national rights and liberties, forms the essence of constitutional monarchy, must certainly be regarded as belonging to this class of States.

German Empire, 1871.

Looking back over the whole subject we see that the system of representative or constitutional monarchy has obtained a most decisive predominance in Western Europe. Almost every civilised European State has recognised not only personal rights but the political rights of the nation and of the classes composing it, and has admitted national representatives to a share in legislation. Monarchy is no longer absolute and unlimited, but has become a supreme legal power (*oberste Rechtsmacht*) limited by the rights of the subjects.

Résumé.

But in other points the constitutional forms are very varied. In England the monarchy is surrounded by a powerful aristocracy, and the actual conduct of affairs is

dependent rather upon the majority in Parliament and the ministers who are responsible to it, than upon the individual will of the sovereign. On the continent there is no aristocracy which enjoys such power and respect. There the democratic element is the most prominent after the monarchy: aristocracy has only a moderating and mediating influence. The constitutional struggles on the continent are between monarchy and democracy, which are always striving to find their proper relations to each other and to the whole State. Each contends for exclusive rule and the suppression of its rival, but the momentary defeat of either has always been followed by a sudden revival. Constitutional monarchy on the continent avowedly strives to assume an organic form which shall give its proper rights to each part of the body politic, to the monarchy its full power and majesty, to the aristocracy dignity and influence, and to the *demos* peace and liberty.

On the continent generally, and especially in France [i.e. before 1870] and Germany, monarchy is the active head of the State, not only in form but by the whole character of the constitution. Only when it comes into conflict with national instincts, and with the great current of history, is it checked by the incalculable force of public opinion which, as a rule, is passive and stationary. Except in such a case as this, it is far stronger than aristocracy, which in Germany is willing to serve the crown for its own ends, and in France murmurs in impotence; it is stronger even than the national representatives, who can control the Government but cannot themselves govern. In France the Bourbon monarchy relied mainly upon the wealthy burghers, Napoleon III upon the lower classes. In the separate German States monarchy looks for support partly to the army and partly to the officials, who in their turn act as the chief restraint upon the crown, while in the Empire it relies upon the support of the masses and the governments of the different States. Nowhere has an organisation been founded which shall satisfy the claims of the *demos*, though numerous efforts

have been made in this direction. When this has been accomplished, when the ruling dynasties have laid aside their mediæval prejudices and conformed to the modern ideas, the long struggle will be over, and full security will have been given to that limited monarchy which is destined to combine the unity of the whole with the liberty of every part, and to bring into harmony the political spirit of Rome and the German sentiment of freedom.

Note.—The above subject has been treated by Gustav Zimmermann in a pamphlet, which attracted great attention at the time it appeared, entitled *Die Vortrefflichkeit der constitutionellen Monarchie für England und die Unbrauchbarkeit der constitutionellen Monarchie für die Länder des Europäischen Continents*, Hannover, 1852. (The excellence of constitutional monarchy for England and the impossibility of its application in continental countries.) This pamphlet is the absolutist rejoinder to the more fertile radical literature on the subject. Zimmermann, like most of his opponents, derives his notion of constitutional monarchy solely from the external forms and maxims of the English constitution. He is probably quite right in maintaining that the English system is not applicable to the continent, because its contradictions and its defects, which at home are corrected and softened down by tradition and by the interests of the ruling aristocracy, would be made far worse if it were carried out in a democratic spirit. But the English system is not identical with constitutional monarchy; it may be the greatest and, in spite of logical errors, the most successful effort to realise it, but it is not the sole perfect realisation. To say that conditions on the continent are unsuited for the English system, is not to say that they are also unsuited for constitutional monarchy, i. e. for a monarchy which recognises that its own political rights, like those of the subject classes, are fixed and limited by the constitution and that for legislation especially all parts of the body politic must work together. An organic monarchy is necessarily constitutional, because the organism itself is the constitution. Zimmermann's perpetual designation of the chief authority as the *property* of the prince shows that, in spite of his keen eye for details, he has no real comprehension of the modern conception of the state. The choice of this mediæval standpoint brings him into collision with the whole current of modern life. For a time he may contrive to dam the flood, but as the waves rise he must be swept away with his frail edifice. (I leave this passage as it was written in 1857. It has been confirmed in 1866.) If there is one principle which is clearly grasped in the present day, it is that political power is a public duty as well as a public right, that it belongs to the political existence and life of the whole nation, and that it can never be regarded as the property or personal right of an individual.

CHAPTER XV.

B. *False Ideas of Constitutional Monarchy.*

Errors:— ALMOST all the civilised States of Europe have adopted the system of constitutional monarchy, hoping to find in it a means of reconciling, not only the contradiction bequeathed by the middle ages, between absolute rule on the one hand, and a weak and divided State on the other; but also the various currents of contemporary politics, and especially those of monarchy and democracy. It is therefore of direct practical importance to discuss the foundations of this system. But it is first necessary to clear away some errors and misconceptions that have prevailed on the subject.

1. That the king has executive power only. The French Revolution set itself in the early years to realise the idea of Rousseau, that the State contains two powers, the will or legislative power, and physical force or the executive power. 'The people wills, the king executes,' was considered in France to be the essential formula of constitutional monarchy [1].

[1] Rousseau, *Contr. Soc.* iii. 1: 'Toute action libre a deux causes, qui concourent à la produire, l'une morale, savoir la volonté qui détermine l'acte, l'autre physique, savoir la puissance qui l'exécute. . . . Le corps politique a les mêmes mobiles, on y distingue de même la force et la volonté; celle-ci sous le nom de puissance législative, l'autre sous le nom de puissance exécutive.' Mirabeau, *Speech of* 1 *Sept.* 1789: 'Deux pouvoirs sont nécessaires à l'existence et aux fonctions du corps politique; celui de vouloir et celui d'agir. Par le premier la société établit les règles qui doivent la conduire au but qu'elle se propose, et qui est incontestablement le bien de tous. Par le second ces règles s'exécutent, et la force publique sert à faire triompher la société des obstacles que cette exécution pourrait rencontrer dans l'opposition des volontés individuelles. Chez une grande nation ces deux pouvoirs ne peuvent être

This idea sets the people in opposition to the king, and in fact suppresses monarchy altogether, as it makes the king a mere servant of the popular will, which is external to him, and formed without his having any part in it. The fall of Louis XVI, and the proclamation of a Republic by the Jacobins, were doubtless the result of historical circumstances, but they were also the natural consequence of this principle of the constitution.

If, on the other hand, the king is regarded as the equal of the legislative power, instead of being excluded from it as a subordinate, the necessary unity of the State organism is destroyed, and an impossible dyarchy[2], a monster with two heads, is created. This must split up the State, or else must speedily give way to either the monarchical or the democratic principle.

2. That the king is purely passive.

To avoid this absurdity Sieyès wishes to make the head of the State purely passive, and regarded this as the basis of the constitutional system. Napoleon, a born monarch if ever man was, branded this proposal with indelible contempt: 'How can you expect a man of talent and honour to resign himself to play the part of a hog which is to be fattened upon two millions?[3]'

3. That the

A more common expression is that 'the king has the

exercés par elle-même ; de là la nécessité des représentants du peuple pour l'exercice de la faculté de vouloir, ou de la puissance législative ; de là encore la nécessité d'une autre espèce de représentants pour l'exercice de la faculté d'agir ou de la puissance exécutive.' Thiers, *Hist. de la Révol. Franç.* i. 97 : '"La nation veut, le roi fait," les esprits ne sortaient pas de ces élémens simples, et ils croyaient vouloir la monarchie, parce qu'ils laissaient un roi comme exécuteur des volontés nationales. La monarchie réelle, telle qu'elle existe même dans les États libres, est la domination d'un seul, à laquelle on met des bornes au moyen du concours national. . . . Mais dès l'instant que la nation peut ordonner tout ce qu'elle veut, sans que le roi puisse s'y opposer par le véto, le roi n'est plus qu'un magistrat. C'est alors la république avec un seul consul au lieu de plusieurs. Le gouvernement de Pologne, quoiqu'il y eût un roi, ne fut jamais (?) nommé une monarchie.'

[2] The discord which is produced by this dyarchy was well understood by the democratic-republican party in France, and they took advantage of it to get rid of the monarchy altogether.

[3] Las Casas, *Mém.* iv.

royal power is exercised by ministers.

right to rule and govern, but the exercise of this right belongs not to him, but to his ministers.' This relation has practically existed at certain times in several countries, and may still do so. But if it is recognised as a permanent political principle, it must lead to the abandonment of monarchy and the introduction of a republic. For if the person to whom a right is ascribed is permanently deprived of its exercise, he loses the real substance of the right, and is certain before long to lose also the empty title, which will pass to whoever has the exercise of the right. In the middle ages the vassals and tenants first exercised proprietary rights over the soil, then they obtained the use or possession, and finally they wrested the complete and formal proprietorship from the former lords. When the Caroling Mayors of the Palace had usurped the royal power from the Merovings, they were not long in seizing the royal title as well. When once the real power of government passes from the king to his ministers, the authority of the latter becomes republican, and the monarchy is an empty form[4]. To keep a mere symbol at the head of the State, instead of a living and active individual, may be Ideocracy, but it is not Monarchy.

4. That the king's personal character is unimportant.

It is therefore absurd to maintain that in constitutional monarchy the personal character of the king is a matter of indifference, that it does not matter whether he is distinguished or a nullity, whether he is intelligent or feeble-minded, whether he is of noble character or a scamp. Constitutional monarchy tends to provide that the king shall be able not only to do as little harm, but also to do as much good as possible. It is only in this sense that his power is limited; he is no mere puppet in the hands of his ministers. It would be a monstrous system which denied the dignity and qualities of manhood to the holder of the

[4] The radical-democratic party in the Frankfurt Parliament of 1848 was not altogether wrong in designating 'constitutional monarchy' as a 'sinecure' and a 'hat without a head,' with no function except to 'appoint a premier' (who will usually be opposed) and to 'rear a successor.'

supreme position in the State, or which granted the smallest measure of political liberty to the possessor of the highest political rights. How would loyalty or affection towards the monarch be possible, if it was a matter of indifference whether he was worthy of such sentiments, or whether he was even capable of understanding and returning them? This principle would lead to the logical conclusion, that the most imbecile prince, as having the least insight and will of his own, would be the most constitutional monarch[5]. Could such a form of State satisfy the longing of nations for a well-adjusted and intelligent organisation?

It is customary to justify this conception by appealing to the English constitution, but in England the personality of the sovereign is not at all a matter of indifference, but the reverse[6].

The famous formula of M. Thiers, *le roi règne et ne gouverne pas*, is equally incorrect as a description of constitutional monarchy. The skilful minister failed in his own attempt to put it into practice. Louis Philippe certainly did not fall because he attempted to *govern* as well as to *reign*, and his successor, Napoleon III, won the favour of the masses precisely by undertaking the government himself.

5. That 'the king reigns but does not govern.'

The expression *reign* implies the formal rights of majesty and dignity, while the word *govern* refers to the practical direction of the policy of the State. Both rights belong equally to the head of the State, and to refuse him the latter or (which is the same thing) to give him the form without

[5] Hegel, *Rechtsphil.* § 280, went too far in maintaining that 'a monarch has nothing to do but to say yes, and to dot the i's.' He has to say no as well as yes, and to give not only the 'formal decision' but also the really decisive word. And besides deciding, he ought to take an active initiative when necessary. J. H. Fichte, *Beitrag zur Statslehre*, 'the most empty-headed regent would be in that case the ideal.'

[6] Any one may be convinced by reading Brougham's *Statesmen of the time of George III*, that the individuality of the king has a great influence upon his ministers, and that it is a mistake to suppose that the royal will is a matter of no importance. [Bluntschli forgets that George III's reign was an exceptional period in English history, in which the king strove, and for a time successfully, to make himself more of a real ruler than his immediate predecessors had been.]

the reality, is to destroy the monarchical power: *rex est qui regit.*

Government (*regieren*) is not to be confounded with *administration* (*verwalten*). It is not the king's function to apply himself wholly to the petty details of the latter, nor would such conduct be for the advantage of the State.

6. That the king must obey the majority.

Others, starting from the idea of the sovereignty of the people, have asserted as the principle of constitutional monarchy that 'the king is bound to govern according to the will and the opinion of the majority of the people.' This sacrifices the monarchy to democratic ideas. The rule of the majority is democracy. But one of the great merits of monarchy lies in the fact that the king is bound to defend the rights and liberties of the minority against the encroachments of the majority. Monarchy would cease to exist if the king were simply a delegate and servant of the majority which really ruled the State. The democracy thus constituted might keep a phantom and powerless king at its head, but he would remain there only as long as his masters found it more convenient to disguise their real power[7].

[7] This was exactly what the French National Assembly of 1789 tried to do. Thiers rightly describes the assembly as 'démocratique par ses idées et monarchique par ses sentiments.' History has shown how impossible it is for such a condition to last. In France the powerless monarchy was destroyed by the omnipotent democracy (1792).

CHAPTER XVI.

C. *The Monarchical Principle and the Conception of Constitutional Monarchy.*

CONSTITUTIONAL monarchy must be a real and not a phantom monarchy.

The essence of Monarchy is the personification of the majesty and sovereignty of the State in an individual. It differs from Theocracy because it attributes the right of rule to the monarch himself instead of regarding him as the representative of God who is the real ruler. It differs from Republics with a doge or president at their head, in the fact that the latter are compelled to regard themselves as the servants or delegates either of the aristocratic minority, or of the democratic majority, whereas the monarch is not the subject of these powers, but the independent holder of the Government. In a republic, political authority has a collective, in monarchy an individual, expression. The monarch is, in the supreme sense, the personality of the State (*Statsperson*).

The essential characteristics of Monarchy:

In this conception there are two sides, both of which must be present, if the name of monarchy is to be preserved:—

I. The personal elevation of the head of the State, as the individual representative and organ of the supreme power.

II. The substantial concentration in the monarch of the highest dignity and power of the State. The two poles of the prince's activity are the *initiative* and the *sanction*.

I. With the first principle may be combined— they allow

legislative checks and ministerial co-operation;

(1) the checking of the monarch in legislation by the representation of the other elements of the nation, and

(2) the obligation on the part of the king to exercise his rights and duties in conjunction with his ministers. For however high the position of the other members of the body politic, the monarchy stands still higher, and by providing that the king's will shall be the will of the State and not his own personal will, the constitution only lightens his task and preserves his authority from misconception or disaster.

but not formal or subordinate monarchy.

But this principle is inconsistent with the idea—

(1) that the monarch is a mere idol or form, and not a living being; or

(2) that the monarch is subordinate to the national representatives or to his ministers, and that he may be compelled by them to express a will other than his own, or to act in opposition to his own will.

Necessary freedom of the monarch.

Since the supreme power belongs to his person, he must preserve the freedom and the rights of his personality[1]. His person does not belong to the State entirely and in all relations, but it does so belong in a special degree, and more than any other person. He may be also a husband or father, the member of a Church, or perhaps a scholar or poet. But in all public affairs the will of the State ought to find expression in his individual will. In a monarchical State great value is placed upon the individual care and energy of the monarch, and it would be monstrous to ascribe to him the highest rights and then on that very ground to place him under the guardianship of others. It is not the chambers which create a law, public respect for a law is based upon the free sanction given to it by the king. The ministers do not give their authority to the king's decrees; on the contrary, they themselves receive their authority from the king, and serve him as the organs, though it may be the indispensable organs,

[1] Guizot, *Mém.* ii. 237: 'Dieu seul est souverain et personne ici-bas n'est Dieu, pas plus les peuples que les rois. Et la volonté des peuples ne suffit pas à faire des rois; il faut que celui qui devient roi porte en lui-même et apporte en dot, au pays qui l'épouse, quelques-uns des caractères naturels et indépendants de la royauté.'

of his will. So far as the king is not bound by the constitution to the consent and co-operation of other members of the State organism, so far he is completely free to express his own personal will and to act in accordance with it.

His relations with legislature and ministers.

The peculiarity of constitutional as contrasted with other forms of monarchy, consists in the monarch being unable either to legislate or, as a rule, to exercise the functions of government by himself alone. For legislation the consent of the chambers is necessary, while in the work of government he must admit the co-operation of ministers. But constitutional monarchy does not transfer the centre of gravity in the government either to the chambers or to the ministers.

A system in which the majority in the chambers or among the ministers could formally and necessarily determine the action of the prince, would be in contradiction with the monarchical principle, and would really be a Government of Parliament and ministers[2]. Doubtless the constitutional monarch will in practice often conform to the decisions of the chambers, or the advice of his ministers, because he will see in them the expression of the will of the State. But if he wishes to discharge his duties as king he must reserve to himself the free right of examining them from the standpoint of the national welfare.

Within these limits the constitutional monarch can move with perfect freedom. It is preposterous to think of preventing him from expressing his own opinion. Every capable man must utter his real sentiments[3], and though political considerations may often restrain the monarch, no

[2] For the system of government by Parliament and ministers, see below, Book vii.

[3] Guizot, *Mém.* xii. 184: 'Un trône n'est pas un fauteuil vide, auquel on a mis une clef pour que nul ne puisse être tenté de s'y asseoir. Une personne intelligente et libre, qui a ses idées, ses sentiments, ses désirs, ses volontés comme tous les autres réels et vivants, siège dans ce fauteuil. Le devoir de cette personne, car il y a des devoirs pour tous, également sacrés pour tous, son devoir, dis-je, et la nécessité de sa situation, c'est de ne gouverner que d'accord avec les grands pouvoirs publics institués par la Charte, avec leur aveu, leur adhésion, leur appui.'

one has the right to deny him freedom of speech or to impose the necessity of falsehood upon him[4].

The monarch ought also to examine into the state of the country with his own eyes and ears; he should inform himself of the needs of the people, watch all the manifestations of public life, and when the general interests and welfare demand it, he should promptly take the initiative in preparing the necessary laws or measures. This is the way in which the great monarchs of former times have distinguished themselves[5]. Constitutional monarchy also opens a great career in such matters to princes of ability, and it should be very careful not to close it.

Power and rights of the Constitutional monarch.

II. The second principle is that the monarch must have the highest dignity and full power in the State. This principle is accepted even in the English constitution, which imposes more limitations upon the royal rights than have been found tolerable by most of the continental monarchies. The following conclusions are involved in this principle:—

1. Constitutional monarchy is not an aggregate of isolated rights, but the unity and fulness of all rights of sovereignty[6]. Absolute monarchy goes further than this, in that it grants

[4] See the noteworthy remarks in Stahl, *Das monarchische Princip*. p. 9. Luther, *Tischreden* (*Table-Talk*): 'There is nothing more graceful or praiseworthy in a prince than to speak freely his opinion, and to do and say without fear whatever he has at heart.' How could he respect the free speech of others, if his own freedom is subject to restraint?

[5] Frederick the Great, *Essai sur les Formes du Gouvernement*: 'Le souverain représente l'État: lui et ses peuples ne forment qu'un corps, qui ne peut être heureux qu'autant la concorde les unit. Le prince est à la société qu'il gouverne ce que la tête est au corps: il doit voir, penser et agir pour toute la communauté, afin de lui procurer tous les avantages dont elle est susceptible. Si l'on veut que le gouvernement monarchique l'emporte sur le républicain, l'arrêt du souverain est prononcé: il doit être active et intègre et rassembler toutes ses forces pour fournir la carrière qui lui est ouverte. Le souverain est attaché par des liens indissolubles au corps de l'État; par conséquent il ressent par répercussion tous les maux qui affligent ses sujets, et la société souffre également des malheurs qui touchent son souverain.'

[6] Article 57 of the Final Act of Vienna (1820) correctly expressed the monarchical principle in its first paragraph, but it included all three kinds of monarchy, absolute, limited by class privileges (*ständisch*), and constitutional monarchy. The second paragraph was hostile to the

to the other political corporations neither independent rights nor any necessary share in the exercise of the royal rights: it claims all rights for itself, and allows to others only grace [7]. Constitutional monarchy, on the other hand, is limited in that it recognises the rights of other corporations and the liberty of its subjects.

2. The monarch has a share in legislation which is usually decisive as regards the substance of a law, and always so as regards its form. He has the initiative and the sanction of all laws, and they are promulgated in his name. If this fundamental rule be denied, the monarchical principle is encroached upon by republican influences, the supreme authority is given to the chambers, and the king, so far as legislation is concerned, becomes their subject. In a monarchy the rights of the chambers can only be concurrent and not exclusive.

3. The whole Government is concentrated in the monarch: it belongs to him as of independent right, and is exercised in his name.

In a constitutional monarchy the ministers or other officials cannot govern in their own name, although at the same time the king cannot govern without their co-operation and agree-

development of constitutional forms: 'The whole sovereign power must be concentrated in the head of the State, and it is only in the exercise of certain definite rights that the sovereign can be bound by the co-operation of the estates.' The subsequent growth of constitutional monarchy has made this article out of date.

[7] One can see that this idea does not follow from the conception of monarchy, by comparing the expressions of Frederick the Great, himself a somewhat absolute ruler. *Antimachiavel*, i: 'Le Souverain, bien loin d'être le maître absolu des peuples qui sont sous sa domination, n'en est que le premier magistrat.' (Elsewhere he uses the expressions, 'le premier serviteur,' or 'domestique de l'État.') Mirabeau, on the other hand, abandons monarchy and sets up the Republican rule of the people, when he says to princes: 'vous êtes les salariés de vos sujets, et vous devez subir les conditions auxquelles vous est accordé ce salaire sous peine de le perdre' (*Essai sur le Despotisme*, *Œuvres*, ii. 279). Still more definite were the expressions about the true position of the monarch used by Frederick II, in his first audience with his ministers (1 June, 1741): 'I think that the interest of the country is also my own, that I can have no interest except that of the country. If ever the two should not agree, the welfare of the country must have the preference.'

ment. All their rights and functions are derived from the royal power, and they cannot employ these rights, as in the feudal monarchy of the middle ages, for their own ends, but must use them for the State, and so as to preserve its organic unity. In relation to the ministers, as in legislation, the king has the initiative and the sanction: and while the former can and must be exercised by the ministers as well, the latter belongs to the king alone, and the ministers have only the right of free consent to the royal commands[8].

Constitutional monarchy recognises the mediæval principle that all authority starts from above and descends to the various lower stages, that government proceeds from the centre to the circumference, and not in the reverse direction. But the mediæval splitting-up of the Government into independent fractions has been avoided in the present day.

All individual organs of the State are subordinate to the monarch, not only those whose action is entirely dependent upon his will, but also the ministers whose consent is necessary before he can express the will of the State, the judges whose range of action is entirely free from his influence, and even the chambers which share the legislative power with him as independent forces in the State. As the head is superior to all other members of the body, so the monarch occupies the highest place in the body politic.

Constitutional monarchy is relative and not absolute; it suits itself to different relations and needs, and varies according to national character and history. It is therefore misleading to derive the conception of it from the English constitution alone.

The following characteristics are common to all forms of constitutional monarchy:—

[8] Lorenz von Stein, *Verwaltungslehre*, i. 86 ff., distinguishes the personal right of carrying out measures (*Vollziehungsrecht*) from the power of government (*Regierungsgewalt*), and demands that the former shall be independent of both the national representatives and of the ministers. This theory opens a comfortable back-door to the absolutism of princes, but it is fatal to the whole constitutional organisation. (In his second edition (i. 136 ff.) von Stein has completely altered his views on this point.)

(1) The dignity and power of the monarch are regulated by the constitution. The constitutional prince does not stand *outside* or *above* but *in* the constitution. It is the regard for the legal organisation fixed by the constitution and binding upon the monarch which gives its name to this form of government. Whether the constitution should be written or not, is by no means a matter of indifference, but it is not essential for the conception [9]. General characteristics of Constitutional Monarchy.

In England, the mother-country of constitutional monarchy, there are single constitutional laws and written declarations of the national liberties, but there is no complete and systematic code of the political organisation, such as is preferred in modern times and usually known as a constitution. The English laws have arisen gradually as the result of political struggles and of special needs at different periods of the history of the nation. Modern constitutions have mostly been elaborated all at once as complete and connected legal systems under the influence of some general theory of the State.

Constitutional monarchy is possible in both forms. But, without contesting the importance of unwritten law, the greatest value has always been placed upon written charters and confirmations of political rights. This is in harmony with the conditions of modern life: in later times the consciousness of right has not grown up in direct connexion with custom, and it can only find the necessary security and clearness in the fixity which is given by a written document.

(2) The constitutional monarch is bound to respect not only the letter of the constitution, but also the laws of the State. He can only expect and demand obedience as regulated by the constitution and the laws [10].

[9] There are some 'paper constitutions,' as Frederick William IV called them in a speech from the throne, which are easily destroyed because they are merely built upon theory, without any real roots in the nation. But a constitution does not become a 'paper constitution' by being formulated in writing; on the contrary this gives greater strength and security to its provisions.

[10] Compare the article *Monarchie* in the *Deutsches Statswörterbuch*.

(3) Legislative power only belongs to the king in combination with the representative chambers. He needs their consent as well as their counsel in order to promulgate a law.

(4) The financial arrangements and the granting of taxes are also dependent upon the co-operation and consent of the representative bodies.

(5) In government and administration the co-operation of the ministers is necessary. The king's ordinances, decrees, and commands are not legally binding upon a third person until the royal signature has been countersigned by a minister.

(6) The responsibility of the ministers and of all other officials is indispensable.

(7) The independence of jurisdiction and the exclusion of the cabinet from judicial functions is a necessary check upon the government and an important guarantee for the rights of subjects.

(8) Classes and individuals must be regarded as possessing not only personal and private, but also public rights, and these are no less inviolable than the rights of the monarch.

Constitutional monarchy must be understood to be the national kingship of a free nation.

CHAPTER XVII.

ARISTOCRACY.

I. The Greek Form. Sparta.

As Athens was the highest expression of ancient democracy, so Sparta was among the Greeks the most marked example of aristocracy. In general the Greek character was more inclined to democratic than to aristocratic forms, and it was only in relation to foreign barbarians that they liked to consider themselves a born aristocracy. But the Dorian race, to which the Spartans belonged, preferred aristocratic forms and tendencies for their domestic institutions as well.

Origin of the Spartan aristocracy.

The ideal principle of aristocracy is the rule of the nobler elements of the nation over the subordinate masses. The way in which these nobler elements are estimated and exalted varies in different states. In Laconia the ruling race was that of the Spartans, who had conquered the land with arms and had subjected the old inhabitants, the Perioeci or Lacedæmonians. Rulers and subjects were divided by birth. The first conquerors organised the government so as to transmit it to successive generations of their descendants. Thus hereditary political rights, a characteristic of all ancient aristocracies, had a natural origin in this endeavour to maintain acquired power, and became a fundamental principle of the whole State.

Its exclusiveness.

This hereditary rule of the Spartans was not modified by any intermixture of races. The distinction between Spartans

and aliens remained as strict and absolute as a difference of caste, and intermarriage was forbidden. Only very rarely and exceptionally was an alien admitted to the full rights of citizenship. The ruling race was never invigorated by the admission of new families, and the subjects were not consoled by the prospect that the best of their descendants might rise by merit to be leaders of the State. This exclusiveness appears the more strange and oppressive as the Spartans were not very careful in other points to maintain the purity of their blood. Spartan wives, whose husbands had fallen in war, were given to the embrace of Helots, that they might give birth to Spartan children.

Education.

But education was all the more carefully organised, and this completed the advantages of birth. The two together were intended to preserve the supremacy of the Spartans. The State was so careful to give a political and military education to its youth, that it did not scruple to sacrifice for this end the unity and the freedom of the family. Nowhere was individual life so subordinate to public life; nowhere was the omnipotence of the State carried to such an extreme as in Sparta. Man was regarded as existing only for the State.

Internal equality.

Among themselves the Spartans were possessed of equal rights: and democratic equality within the aristocracy was carried so far that Lycurgus made it a basis of his constitution that all Spartan families should possess equal property[a]. Each family had an equal lot (κλῆρος) in the division of the land, and was forbidden to alienate it. To prevent the accumulation of personal property, which might create a distinction between rich and poor, the use of gold and silver was prohibited. The Helots, who cultivated the lands of the Spartans, were not the property of individuals, but belonged, like the lands themselves, to the State; and their payments in kind were by law equally divided. Even the

[a] [The equality of property in Sparta is denied by Grote, *History of Greece*. Part ii. ch. 6. But Plato, *Laws*, iii. 684, certainly points to a *tradition* of an original equality at the time of the Dorian conquest.]

Syssitia, or public meals, at which the citizens were divided into separate tables, were common and equal for all. Thus equality was much more complete and secure among the aristocratic Spartans than among the democratic Athenians.

Institutions:—

But the Spartan rule was by no means exercised in a democratic form, to which in fact the character both of the State and of the nation was opposed. A popular assembly (ἐκκλησία or ἀλία) existed in Sparta, but the real power was in the hands of the Senate (γερουσία), which usually decided all public business[1]. Their decisions were in important matters submitted to the *ecclesia*, but merely for acceptance or rejection. In the latter no one could speak except the kings, the ephors and senators, and no one could vote except men of at least thirty years of age.

The Ecclesia.

The composition of the State was regulated by aristocratic considerations. The 9000 heads of Spartan families were divided into 30 *Obæ*, which may be compared with the Roman *Curiæ*. The two royal *Obæ* nominated the two kings, and each of the other 28 *Obæ* nominated one senator, who was to some extent the peer of the kings[2]. Thus the senate was composed of thirty members, and this arrangement prevented the exclusive preponderance of single families, while it served the dignity and rights of the different families as a whole. The Spartans paid the greatest respect to old age, as the essential condition of wisdom. All senators, except the king, must be at least sixty years old. This excessive regard for age seems to be a blot on the constitution. Years bring weakness as well as wisdom: and the conduct of the state requires not only the experience of age, but also the full productive power and fresh vigour of manhood. The election was made by the acclamations of the popular assembly, which had been previously canvassed by the candidates. By canvassing for this high dignity the old

The Senate.

[1] The *ecclesia* of the Spartans had the same power and importance as the national assemblies of ancient Greece in the time of Homer. See C. Trieber, *Forschungen zur spartanischen Verfassungsgeschichte*, Berlin, 1871, p. 114.

[2] Homer gives the name of βασιλέες to these councillors of the king.

men expressed their conviction that they could still render good service to the State and their willingness to devote the rest of their life to its service: the acclamation of the assembly expressed the confidence of the people. The duration of the office, which was for life, was a security against the capricious changes of popular favour, but involved the danger that it might be retained in spite of growing weakness and incompetence.

Kings and Ephors.

The Spartan aristocracy was limited, partly by the kingship, which represented in a more lofty manner the unity and dignity of the State, and partly by the democratic institution of the *ephors*, the changing organs of the people, who controlled the official activity both of the kings and of the senate, and also exercised an extended jurisdiction in affairs of State.

Artificial character of the constitution.

The Spartan constitution impresses one as a work of art. Like Plato's Republic, it gratifies the sense of external beauty and harmony, but its interior is so unnatural [3] that on the whole it repels rather than attracts. Its architecture may inspire admiration, but it offers no temptation to dwell within it. If the Athenians deserve to be blamed for having preferred the rule of the masses to a well-ordered State, the Spartans may also be accused of having sacrificed human freedom to political organisation. Their system is more distinguished, but it affords less pleasure and comfort than the Athenian: the one maintains an even balance of political capacity, the other offers at once more light and more shade: the one is too stationary, the other too mobile.

Its durability.

In durability, the Spartan constitution had an immense advantage. Solon witnessed, without being able to prevent, the victory of tyranny over the democracy which he had established with its mixture of the aristocratic elements of birth and wealth. After the fall of the tyrants, pure democracy was introduced at Athens, but it fell into obvious and

[3] The Greeks did not realise this as we do, because the freedom of the individual life did not appear especially natural to them, and the Spartan constitution agreed with their ideal. Comp. Trieber, *l. c.*

hopeless collapse before it had existed a century. On the other hand, the constitution of Lycurgus maintained the greatness of Sparta for five centuries. When Sparta did fall it was because that constitution had been violated by the accumulation of wealth, by the corruption which was thus introduced, and by the demagogic intrigues of the ephors [a]. The durable power of the constitution itself is the more astonishing when we consider that its provisions were opposed both to human nature and to the current of events, but it may have been partly due to the ideocratic belief of the people that its founder was the favourite of Zeus, and himself a demi-god.

The similar constitution of Crete, and the equally aristocratic constitution of Carthage, can boast of equal durability [b]. In fact, history proves that aristocracies, by making stability the essential principle of their organisation, can maintain themselves and the State much longer than democracies can preserve the rule of the *demos*.

[a] Laurent (ii. 290) points out that the immutability of the constitution was a cause of the depopulation of Sparta.

[b] [The constitution of Sparta is criticised by Aristotle in *Pol.* ii. c. 9: that of Crete in c. 10: and that of Carthage in c. 11.]

CHAPTER XVIII.

II. The Roman Aristocracy.

Comparison of Spartan and Roman constitutions.

In its essential character, the Roman Republic was as much an aristocracy as Sparta, but of a higher kind. The Romans drew a sharp distinction between the public rights of the State and the freedom of individuals and families. They had also a conspicuous sense of the grandeur and power of the State which they were eager to increase, but they never assumed the right of shaping the individual life to suit the State. Thus they avoided that artificial and narrow exclusion of every foreign element which may have preserved the purity of national virtue among the Spartans, but at the same time made them incapable of maintaining that prominent position in the outside world to which destiny had called them. From the beginning the Romans were free from that rigidity of class distinctions which is found in Sparta. Classes in Rome did not stand immovably face to face, each paralysing the action of the other, but contributed by their struggles and varying influences to a higher development of political life. The Roman constitution is a work of art like the Spartan, but on the one hand it is more in conformity with human nature and the general conditions of the world, and on the other hand it is more distinguished by its wealth of forms and the grandeur of its relations. The Roman State impresses one very notably as an organism.

Aristocratic character of

If we consider the principal aspects of the Roman Republic we find the aristocratic character everywhere pre-

vailing, although modified by monarchical and democratic institutions. This is manifest in (1) the relations of classes; (2) the national assemblies; (3) the senate; (4) the magistracies. the latter obvious in

The Roman patricians did not, like the Spartans, derive their origin from a single race, but from the Latins and Sabines, and partially from the Etruscans, just as the English nobles combine Saxon and Norman blood. From the first this fact must have acted to prevent rigidity and despotism on the part of the patriciate. And afterwards, though all political power was for a long time in their hands, it was moderated by the organisation of the *plebs* with its own magistrates, and by the necessity of giving an increasing share in the government to the new plebeian aristocracy. Ultimately from the union of the old with the new aristocracy arose the class of *optimates*[1], a class which was never exclusive, but which was of supreme importance in the Roman State. 1. The relations of classes;

As long as the Republic lasted, the aristocracy retained the traditions of government and the familiarity with public affairs. It was distinguished by birth, education, wealth, power, religious and political knowledge. At the same time it never ceased to draw to itself new forces from the plebs. While it advanced to the highest power, and became first the equal and then the superior of kings, it never ceased to be in complete accord with the people from whom it had sprung.

The Romans were as careful about political education as the Spartans, but they treated it as the business of the family, and not of the State. Hence came the variety and the hereditary character of political tendencies, while in Sparta everything was uniform within the aristocracy. Most of the great Roman families were, and remained, conservative; but some, for example the patrician Valerii and the plebeian Publilii and Sicinii, were inclined to liberal principles. The

[1] Compare above, Book II. ch. x. p. 131.

Claudii, with rare exceptions, may be compared with the English Tories.

2. the national assemblies; *Comitia Tributa.*

Of the three Roman assemblies only the youngest, the *comitia tributa*[a], had a democratic organisation. They were not originally destined to take any part in the government, but only to act as an organ of the wishes and opinions of the plebeians, and as a limit upon the excessive power of the patriciate. Later, however, they not only became a factor in legislation, but usurped the whole legislative power. But even in the later years of the Republic, when the aristocracy was rapidly declining and monarchy was close at hand, it was only in very exceptional cases, and under the influence of some ambitious tribune, that the *comitia* of the tribes exercised a really decisive power. As a rule the encroachments of democracy were hindered, partly by regard for the immense authority of the senate, and partly by the tribunes themselves, as they alone could make proposals and each of them could control and obstruct the action of the other[b]. The ordinary function of the *comitia tributa* was to act as a check upon the obstinacy and excessive power of the aristocracy.

Comitia Curiata.

The *comitia curiata*, which lost all their original importance and sank into a mere form in the later times of the Republic, were thoroughly aristocratic. They formed the assembly of the old patrician aristocracy of birth, arranged by families and *curiæ*, and the senate was originally only a committee of the heads of these families. If the plebeians

[a] [For the relation of the Tribe-assembly of the *plebs* (*Concilium plebis tributum*) to the assemblies of the populus (*comitia* proper), see Mommsen, *Forschungen*. He distinguishes (1) the assembly of the corporation of the *plebs*, whose *plebiscita* finally acquired the force of *leges* by the *lex Hortensia* of 287 B.C.; and (2) the assembly of the whole people (*populus*) by tribes (*comitia tributa*), which in the fourth century B.C. began to absorb much of the business of the *comitia centuriata*. But as the numbers of the patricians diminished, the difference between an assembly of the *populus* and of the *plebs* became almost purely formal.]

[b] [The Tribunate, which was originally merely the organ of the corporation of the *plebs*, thus became practically an instrument of senatorial government, until the Gracchi turned it to other uses.]

were ever admitted to the *comitia curiata* it was only in a very subordinate position.

The most important of the assemblies, the *comitia centuriata*, in which the whole nation met together, was so organised as to give the most decisive preponderance to the upper classes. *Comitia Centuriata.*

(*a*) Great weight was attached to property. The first class alone, consisting of those who paid the highest rating, contained eighty centuries, and if the eighteen centuries of the knights voted with them, they had an absolute majority of votes. The same relation of voting power to property prevailed also in the four other classes: four persons in the second class were equal to six in the third, twelve in the fourth, and twenty-four in the fifth class. The numerous *proletarii* and the still more numerous *capite censi* were all crowded into one of the 193 centuries, and had thus a very slight influence in an assembly where the aristocracy of wealth was so powerful [1a].

(*b*) Birth and nobility of profession were also considered. Thus the eighteen centuries of the knights, which were formed on these principles, were placed, as the most noble, at the head of the assembly.

(*c*) Age too had a greater voting power than youth, for the centuries of the *seniores* contained by the natural laws of mortality only half as many members as those of the *juniores*, though both counted as the same.

(*d*) If we put the classes out of sight, it is obvious that the whole external appearance of the assembly was the reverse of democratic. The taking of the auspices, the fixed military organisation of the whole body, the presidency of great magistrates, and the rule that they alone had the right of addressing and treating with the people (*jus agendi cum populo*), all gave the assembly a dignified and moderate character. It was not unnatural that a Roman should look

[1a] On the constitution of the *comitia centuriata* compare Madvig, *Verfassung und Verwaltung des römischen Staats*, i. 109 ff.; and on its later development, *Ib.* i. 117 ff.

with a certain lofty contempt upon the chaos and turbulence of a Greek ecclesia [2].

This aristocratic organisation of the nation was entrusted with the making of the real laws and with the election of the higher magistrates.

3. The Senate;

The Senate was also a very important institution of the Roman state by its composition and its functions. Originally consisting of the heads of the patrician families, of the *principes*, and representing mainly the aristocracy of birth, it became later an assembly of statesmen who had proved their capacity by holding high office. The history of the senate shows us the transformation of the patrician nobility, which continued to be respected as the source of the auspices and the guardian of sacred traditions, into the later nobility of office. The great magistrates of Rome might be compared with kings, and the ancients themselves called the senate, which consisted of men who had held these magistracies, 'an assembly of kings'; so high was the position of this political aristocracy. The censors, as the guardians of morals were entrusted with the honourable task of forming the list of senators from among the ex-magistrates and of excluding unworthy individuals. The senators sat and voted according to the rank of the office they had held, as having been consuls, censors, prætors, ædiles, or quæstors. Their business was conducted with the strict formality that characterised Roman rule. It was opened with prayer and sacrifice, all its proceedings were conducted by the ruling magistrates, who also

[2] Cicero, *pro Flacco*, c. 7: 'Nullam illi nostri sapientissimi viri vim concionis esse voluerunt; quae scisceret plebes aut quae populus juberet, summota concione, distributis partibus, tributim et centuriatim descriptis ordinibus, classibus, ætatibus, auditis auctoribus, re multos dies promulgata et cognita, juberi vetarique voluerunt. Graecorum autem totae res publicae sedentis concionis temeritate administrantur. Itaque ut hanc Graeciam, quae jamdiu suis consiliis perculsa et afflicta est, omittam: illa vetus, quae quondam opibus imperio gloria floruit, hoc uno malo concidit, libertate immoderata ac licentia concionum. Quum in theatro imperiti homines, rerum omnium rudes ignarique, consederant, tum bella inutilia suscipiebant; tum seditiosos homines reipublicae praeficiebant; tum optime meritos cives e civitate ejiciebant.'

brought forward proposals and took the votes; and the deliberations were preserved from digression or encroachment by the intervention of the tribunes or magistrates.

All important state business was either prepared or decided in the senate. It provided for the worship of the gods and their festivals and sacrifices. It conducted the negotiations with foreign states and envoys, and managed all the important diplomacy of Rome. Its criticism of laws and its approval were usually decisive. In the sphere of administration its own decrees (*senatusconsulta*) took the place of laws. It managed all the finances, granted taxes, and determined the objects and the amount of expenditure. The levying and arrangement of troops were in its hands, as were also the granting of powers and instructions to the proconsuls and proprætors who had received provinces, and the control of the whole provincial administration. In serious crises the senate could grant to the consuls that unlimited power which seemed necessary to save the republic from harm.

4. the magistracies.

It may be doubted whether the Roman magistracies were monarchical or aristocratic institutions, but it is certain that they were not democratic. This is obvious in the external forms that surrounded them, the purple border of the toga, the raised curule chair, the voluntary band of assessors and friends, the procession of lictors, and the connexion with the gods which is expressed in the auspices taken on appointment and kept up by frequent consultations afterwards. The extensive and in itself absolute power which lay in the *imperium* of the magistrates was essentially royal[3]. The republican side of their character was visible only in the short duration of their office, and in the division of their power between two or more magistrates of equal rank. An aristocratic principle, which is peculiar to the Roman constitution and is very notable, is seen in the power of every magistrate to obstruct by his veto any official action of a magistrate of

[3] Cicero, *de Legibus*, iii. 3: 'regio imperio duo sunto.' Polyb. vi. 11, § 7: *τῶν ὑπάτων ἐξουσίαν, τελείως μοναρχικὴν ἐφαίνετ' εἶναι καὶ βασιλικήν.*

equal or inferior rank[1]. This principle moderated the omnipotence of the *imperium*, without weakening its activity when the necessity or the advantage of the State called for its exercise.

The magistrates were chosen by the whole people, but the election to the higher offices was reserved to the *comitia centuriata*, in which the aristocracy of wealth preponderated, and which were managed by the magistrates and limited by the auspices. Moreover such election was as a rule open only to those who belonged to the national aristocracy, either because they belonged to a distinguished family, which gave them a famous name, a large body of clients, and popular favour, or because they had great wealth which enabled them to gain over the masses by public games at their expense, or because they had acquired reputation and influence as successful generals, or eloquent orators. After the higher magistracies had been opened to the plebeians, they were no longer limited to the nobles by birth; but in all but very exceptional cases they were practically confined to that great political and social aristocracy into which the patriciate was transformed. Also those who had held these offices formed the senate.

It must be admitted, therefore, that the Roman republic, in spite of the influence of monarchical and democratic elements, was essentially an aristocracy. And it was not an aristocracy of a family, or of a class, like the numerous forms of the middle ages, but the most magnificent and powerful national aristocracy that the world has ever seen.

[1] Hence the formula in Cicero, *de Leg.* iii. 3: 'ni par majorve potestas prohibuisset.' It is the same principle which prevailed in the Roman private law among co-proprietors: 'neganti major potestas.' Comp. Gellius, *Noctes Atticae*, xiii. 12, 15.

CHAPTER XIX.

III. Remarks upon Aristocracy.

Montesquieu [a] has declared *moderation* to be the principle of aristocracy, and it is true that moderation is needed for its security as it is suggested by the consideration that the subject masses are superior in number and physical force. The feeling that its power has no external limits may impel a democracy to an immoderate use of that power. But aristocracy cannot easily free itself from the fear of opposition and revolt, and is thus induced as a rule to keep its preponderance from being too oppressive. It knows that its position is insecure without moderation, and therefore its policy is usually conservative. The essential principle of aristocracy.

But this fails to express the essential principle of aristocracy, which is rather to be found in the moral and intellectual superiority of the ruling class. It is no true aristocracy unless the best (οἱ ἄριστοι) really rule [1]. Aristocracy loses all real vitality when the ruling class degenerates from the qualities which raised it to power, when its character decays, and it becomes weak and vain. It perishes equally, even though

[a] [*De L'Esprit des Lois*, iii. ch. 4.]

[1] Montesquieu's assertion that virtue is the principle of democracy [*ibid.* iii. ch 3] is not nearly so correct as Aristotle's dictum (*Pol.* iv. 8, § 7. 1294 a. 10): 'The characteristic of aristocracy is virtue, that of democracy freedom.' But historical reality has little in common with the ideal of philosophers. De Parieu, *Polit.* p. 56: 'L'aristocratie a toujours en fait désigné le gouvernement des plus puissants plutôt que celui des plus vertueux.' This work of De Parieu contains many excellent remarks upon aristocracy.

its great qualities remain, when the subject classes attain to equal distinction, and the old aristocracy is too negligent or too disdainful to complete and strengthen its own forces by their admission. The Roman aristocracy obtained its greatness, and the English aristocracy has preserved its influence and respect, because both remained in living union with the life of the people, and constantly derived new vigour by recruiting themselves from the classes below them.

Its exclusiveness is often fatal.

Exclusiveness is the cardinal fault of every aristocracy. The privileges of the ruling class are founded upon its qualities, but in the endeavour to secure the former by the strong defence of hereditary succession, it has often lost sight of the latter altogether. Such a limited aristocracy may maintain itself upon a small scale, but when its relations are extended it becomes unequal to the task. Sparta and Venice became weak when they had made great conquests. Neither the Spartans proper nor the Venetian *nobili* were numerous or strong enough to rule extensive territories, and the rest of the people, excluded from political life and influence, could give but feeble assistance[2]. So, too, the aristocracy of Berne was ruined, not so much by the internal degeneration of the patriciate, as because it failed to recruit itself from the distinguished men of the city and country.

Various forms of aristocracy.

All aristocracy is based upon the distinction of quality, but the particular quality chosen depends upon the peculiar character and condition of the people. If it is birth, as in so many of the mediæval aristocracies, we have an aristocracy of family, a *noblesse* (*Geschlecter- oder Adelsaristokratie*), in which the rights of families or of classes have a great influence upon the constitution. The preference of culture and education forms an aristocracy of priests or of scholars. If age is regarded as the qualification for rule, we have an aristocracy of elders (*Aldermänner*) or senators; if military distinction, an aristocracy of knights; if property, either in land or moveables, an aristocracy of landowners or capitalists,

[2] See Machiavelli, *Discorsi*, i. 6.

or in other words a plutocracy, which Cicero declares to be the most hateful of all forms of state[3]. The aristocracy of *optimates* has a party character, because it combines a number of families and persons. An aristocracy of office may be regarded as founded upon political motives, especially while it remains an elective aristocracy, but less so when, as happened in the middle ages, it gradually becomes hereditary, and thus turns into an aristocracy of birth, or *noblesse.* Not infrequently several qualities are combined to form an aristocracy, and this is stronger than one which is based upon a single quality, because the latter has to face the hostility of all classes and persons who have other natural claims to aristocratic position.

General characteristics: (1) External pomp.

Aristocracy is eager to make its advantages conspicuous, and therefore to display the external grandeur and dignity of the State. It may dispense with the affection, but never with the respect of its subjects, and it seeks to impress them by an imposing display of external pomp, which gives distinction to political forms and also strengthens authority. This is a marked advantage of aristocracy over democracy, because the latter may too easily degrade both their magistrates and the State itself to the level of common life.

(2) Harshness of rule.

But the advantage also involves a danger that the ruling classes may over-estimate themselves and may pay too little care and attention to their subjects. Aristocracies have often displayed towards the lower classes a harshness and cruelty which have been the more intolerable because accompanied by contempt. Convincing evidence of this is to be seen in the treatment of the Helots by the Spartans, the oppression of plebeian debtors by the Roman patricians, the sufferings of Irish cottiers at the hands of English landlords, and the greedy despotism exercised by English governors over the Hindus of India and the negroes of Jamaica[4].

[3] Cicero, *de Rep.* i. 34: 'nec ulla deformior species est civitatis quam illa in qua opulentissimi optimi putantur.' Comp. Leo, *Naturlehre des Staats*, p. 89 ff.

[4] Comp. De Tocqueville on the English aristocracy, *Œuvres*, t. viii.

(3) Excessive rigidity.

As democracy as a rule is too fickle and changeable, so aristocracy rushes into the opposite fault of excessive fixity and obstinacy. Democracy, conscious that its power is unlimited, easily forgets the conditions of its maintenance. Aristocracy, full of anxiety to maintain itself, often falls into the error of thinking that the best way to accomplish this is to hold fast to the old system and to rigidly exclude every change. As a matter of fact aristocracies have shown more capacity for a policy of conservatism than democracies, and their existence has always been longer. They avoid rash political experiments, they advance by cautious and measured steps, and it is only when threatened by real danger that they display decisive energy and copy for a time the characteristics of monarchy. Within limits this is a good quality and springs from the natural instinct of self-preservation; but if carried beyond those limits it becomes a fatal error.

(4) Excessive attachment to hereditary right.

This conservative spirit shows itself also in the natural tendency to make heredity the fundamental principle of its institutions. In the middle ages, when the whole of Europe was impressed with an aristocratic character, this tendency was especially conspicuous. Even the Empire, although originally founded upon the idea of monarchy, became essentially an aristocracy after the fall of the Hohenstaufen [5].

[5] This was well known to the Frenchman Bodin, but since then many German historians have found it convenient to forget it. Bodin, *de Rep.* ii: 'Et quoniam plerique imperium Germanorum monarchiam esse et sentiunt et affirmant, eripiendus est hic error.... Neminem autem esse arbitror, qui cum animadverterit, trecentos circiter principes Germanorum ac legatos civitatum ad conventus coire, qui ea, quae discimus, jura majestatis habeant, aristocratiam esse dubitet. Leges enim tum imperatori, tum singulis principibus ac civitatibus, cum etiam de bello ac pace decernendi, vectigalia ac tributa imperandi, denique judices imperialis curiae dandi jus habent.... Sceptra quidem, regale solium, pretiosissimae vestes, coronae, antecessio, subsequentibus Christianis regibus, imaginem regiae majestatis habent, rem non habent. Et certe quodam modo jure omnibus ornamentis ac honoribus cumulari mereatur: sed ea est aristocratiae bene constitutae ratio, ut quo plus honoris eo minus imperii tribuatur; et qui plus imperio possunt, minus honoris adipiscantur, ut omnium optime Veneti in republica constituenda decreverunt. Quae cum ita sint, quis dubitet rempublicam Germanorum aristocratiam esse?' Philipp Chemnitz (*Dissert. de ratione status in imperio nostro Rom. Germ.*, 1640) based his schemes of reform upon

The imperial dignity itself did not become hereditary, but was filled up by the choice of the hereditary electors. But the Emperor, in spite of his dignified position, had very little power. Before deciding any important matters he had to consult the Diet. The electoral college prepared all laws and had the first vote in the Diet. The second vote belonged to the other princes, who had contrived to transform what were originally offices of State into hereditary sovereignties. After the princes came the college of the imperial cities, but in these the government was usually held by a patrician oligarchy, so that their representation was really aristocratic. The government was exercised by the Emperor and Diet conjointly: the central authority was everywhere hindered and obstructed by the feudal independence of the landowning nobles. In all the political and legal relations of the middle ages, the aristocratic inclination to hereditary succession is visible. It regulated everything; fiefs, imperial offices and dignities; all grades of jurisdiction, whether of counts, bailiffs, territorial lords, or even the local assessors; knighthood and court service; rank and office in towns and villages, and the manorial holdings of the peasants.

Modern times, on the other hand, have shown a decided aversion to heredity as a political principle. Both tendencies contain an element of truth, but both are wrong if carried to excess. In our own day it is right to struggle against the restraints which rigid heredity imposes upon modern development and the satisfaction of new needs; it is right to claim the free recognition of individual worth, and to insist that political offices, which demand personal ability and subordination to the whole, shall not be subject to

the idea that Germany was an aristocracy. Comp. Perthes, *Das deutsche Statsleben vor der Revolution*, 1845, § 246. Puffendorf called the Empire a mongrel compound of monarchy and aristocracy, but recognised the prevailing tendency to aristocracy. [Nobody now denies that the Empire after the fall of the Hohenstaufen was an aristocracy with an ornamental monarch. The same arguments might have convinced Bluntschli that the English monarchy is equally ornamental.]

hereditary rules or treated as the property of particular families. But it is wrong to break off the connexion which hereditary succession maintains between the present and the past: it is wrong to introduce loose and frequent change where the stability of tradition is needed, or to alter, without need, conditions which may serve as strong pillars of the State, and which may transmit to the future great moral interests and forces. To do this is to build upon the sand: it involves a breach of the organic nature both of nation and State, for their life does not vary with each generation, but is prolonged in unbroken course from century to century[6].

(5) Devotion to law.

Aristocracy sets itself to preserve external order as the

[6] In aristocratic England the importance of political heredity is still fully comprehended. See the expressions of Burke in his *Reflections on the Revolution in France* (Clarendon Press Series, p. 38): 'You will observe, that from Magna Charta to the Declaration of Right, it has been the uniform policy of our constitution to claim and assert our liberties, as an *entailed inheritance* derived to us from our forefathers, and to be transmitted to our posterity; as an estate especially belonging to the people of this kingdom without any reference whatever to any other more general or prior right. . . . We have an inheritable crown; an inheritable peerage; and an house of commons and a people inheriting privileges, franchises, and liberties, from a long line of ancestors. . . . A spirit of innovation is generally the result of a selfish temper and confined views. People will not look forward to posterity, who never look backward to their ancestors. Besides, the people of England well know, that the idea of an inheritance furnishes a sure principle of conservation, and a sure principle of transmission; without at all excluding a principle of improvement. It leaves acquisition free; but it secures what it acquires. . . . Our political system is placed in a just correspondence and symmetry with the order of the world, and with the mode of existence decreed to a permanent body composed of transitory parts; wherein, by the disposition of a stupendous wisdom, moulding together the great mysterious incorporation of the human race, the whole, at one time, is never old, or middle-aged, or young, but in a condition of perpetual decay, fall, renovation, and progression. Thus, by preserving the method of nature in the conduct of the state, in what we improve, we are never wholly new; in what we retain, we are never wholly obsolete. . . . In this choice of inheritance we have given to our frame of polity the image of a relation in blood; binding up the constitution of our country with our dearest domestic ties; adopting our fundamental laws into the bosom of our family affections; keeping inseparable, and cherishing with the warmth of all their combined and mutually reflected charities, our state, our hearths, our sepulchres, and our altars.'

security for its own maintenance. The same motive urges upon it the protection of law and the careful observance of legal forms. Except when its passions have been aroused by danger to its existence, aristocracy is entitled to boast that it has shown more justice than democracy in its treatment both of its subjects and of its own members. It is no accidental circumstance that the greatest development of the science of law was the work of an eminently aristocratic nation, the Romans. Equal recognition has been given to the strict but impartial justice of the Venetians, to the wise law of Berne, and to the strong sense of law which characterises the aristocratic English. In the middle ages policy itself took the external form of a legal judgment and its execution.

Decline of aristocracy

Contemporary opinion is so unfavourable to aristocracy as a form of State, that no example has survived the middle of the nineteenth century. The aristocracy of ancient Rome was first broken by the rise of democracy and then crushed by the Empire. The mediæval aristocracies of Italy and Germany were humbled by the growing power of the princes, and ultimately destroyed by the hostility of the burgher class. In the modern State, therefore, the aristocratic classes, as a distinct part of the nation, assume an intermediate and not a sovereign position. Everywhere they are subordinate either to monarchy or democracy, and though they may moderate the one and ennoble or restrain the other, they can no longer claim as their right the government of the State.

CHAPTER XX.

DEMOCRATIC FORMS OF THE STATE.

I. Direct Democracy (Ancient).

Difference between ancient and modern democracy.

THERE is a great difference between the ancient idea of democracy (δημοκρατία, the rule of the *demos*, of the free and equal citizens) and that of modern times. Among the ancients men started from the State and sought to secure the liberty of all by dividing political rule equally among all. Now they start from individual liberty, and strive to give away as little of it as they can to the State, to obey as little as possible. The old democracy, whether absolute or modified in form, was always *direct*; modern democracy is as a rule *representative*. It is obvious that the former can only exist in a small state, while the latter is also applicable to a great nation with extended territories.

Democracy in Greece.

The Greeks, split up into a number of little states, sought and found in democracy the satisfaction of their political tastes. It is undeniable that something democratic is to be found even in the old monarchies and so-called aristocracies of Greece, which distinguishes them from modern monarchy or from the Roman aristocracy. It is also notable that the greatest Greek philosophers, while unfavourable in their judgment of the absolute democracy of Athens[1], took a

[1] On this point Xenophon, Plato, and Aristotle are all agreed.

moderate democracy as their ideal, and gave to it the name of polity or constitutional government (*πολιτεία*) in a special sense [a].

Democracy found its most logical expression in Athens, and its nature can nowhere be better studied than in the Athenian constitution. In no other state was the rule of the people so extensive; almost all important business was brought before the *ecclesia*, which met so frequently, often once a week, that it would be inconceivable if we did not remember that ordinary and professional labour was carried on not by the free citizens but by the numerous slaves. The Athenian constitution.

The *ecclesia* was the visible representation of the many-headed *demos*. It contained all citizens over twenty years of age, unless they had become liable to any loss of civic rights. In it the Athenians felt themselves to be the lords of the state, each individual to be a part of the sovereign whole. The characteristic mark of democracy is that the majority shall rule and that every citizen shall have a share in the governing power, and this was here fully developed. Every citizen had a free right of speech, and the privileges of age, which existed in the times of Solon, were soon swept away with all other restrictions as burdensome. An orator had free scope for his eloquence, and The *ecclesia*.

[a] [Only Aristotle uses *πολιτεία* in this sense. Cp. *Eth. Nic.* viii. 10, § 1; *Pol.* iii. 7, § 3; iv. c. 7 and 8. But this *πολιτεία* is not his ideal state, but only the 'best average state.' See *Pol.* iv. c. 1 and 2. Plato in the *Republic* places democracy below oligarchy, but in the *Politicus*, 302, 303, he reverses their positions and distinguishes two kinds of democracy, a good and a bad. It is to this 'good' kind that Aristotle gives the name of *Polity*. In discussing the Solonian constitution (*Pol.* ii. 12) Aristotle distinguished *ἡ πάτριος δημοκρατία*, which may be considered 'a good mixed constitution,' from the extreme democracy of later times. Plato, in the *Politicus*, 293, separates the ideal State from all the five or six ordinary forms of government. Whether one, few, or many rule is unimportant in comparison with the question, whether those who rule have the science of ruling or not. But since he thinks this science of ruling is more likely to be found in one or the few than in the many, he generally speaks of the ideal State as kingship or aristocracy (as in the *Rep.*). Aristotle on the other hand vindicates the political capacity of the many (*Pol.* iii. 15, §§ 7, 8).]

could often exercise a magical influence over the crowd. It was fortunate when great statesmen, like Pericles, could support their opinions by oratory. More often men's minds were carried away by adroit and ambitious demagogues, who ruled the mob by exciting its passions. There is nothing in the modern state which at all corresponds to this influence of oratory, which moved its assembled hearers far more strongly than the press can move its scattered readers. The orator's voice and gestures added meaning and emphasis to his words, and the approval of the crowd as it listened in the consciousness of power gave a mighty impulse to the debate. In our own day parliamentary speeches have much less influence, partly because our assemblies are smaller and more select, and partly because their power is more limited.

its powers; The powers of the *ecclesia* embraced the whole life of the State. Solon had limited them to the election of magistrates, the control of the government, and advice about laws, but the *demos*, led by its orators, soon overstepped these limits. The decisions of the people (ψηφίσματα) were as decisive as those of an absolute despot; like him the *demos* could command what it pleased, even though contrary to the law[1]. Legislation properly belonged to the *nomothetæ*, but their decisions were practically determined by the debates and votes of the *ecclesia*, of which they were only a numerous committee elected in each particular case. The assembly itself decided all the important affairs of government. It appointed ambassadors and determined their instructions; it heard the envoys of foreign states, decided on peace or war, chose the generals, and fixed both the pay of the soldiers and the conduct of military operations. In its hands lay the fate of conquered towns and countries, the acceptance of new gods, the regulation of religious festivals and new priesthoods, the granting of the rights and privileges of citizenship. It received once

[1] Comp. Aristot. *Pol.* iv. 4, §§ 25, 29, 1292 a. 6, 24.

in each *prytany* (35 or 36 days) a financial report of the State revenue and expenditure; it levied taxes, fixed the tax paid by aliens (*μετοίκιον*), regulated the coinage, and demanded voluntary contributions. Its approval was necessary for the construction of temples, public buildings, roads, walls, and ships. It could employ the public revenues even in favour of private individuals by paying for their admission to the theatre. Its powers did not extend to ordinary jurisdiction, but in exceptional cases, when a crime was not covered by the law, or when aggravating circumstances justified extraordinary measures, it debated criminal charges, fixed the penalty, and often decided on the guilt of the accused. The degeneracy which rapidly followed the flourishing period of the democracy increased the abuses of this popular jurisdiction.

its character.

In the assembly the majority of citizens present was decisive. The intelligence of the people, even of the lower classes, was more developed than in any other state, ancient or modern. They could appreciate the tragedies of Aeschylus and Sophocles, they listened to the speeches of Demosthenes, they were enriched by commerce and empire, and by the ample reward of every kind of labour. Yet even amongst such a people as this the majority was unable to resist the seductive arts of demagogues, and was unwilling to exercise its power with wisdom and justice. The minority of nobler and more wealthy citizens was oppressed and maltreated, and Xenophon, referring to his native city, declared it to be a necessary consequence of democracy 'that the lot of the wicked should be better than that of the good[3].'

[3] Xen. *de Rep. Ath.* c. 1. § 1. In c. 2. § 19 he asserts that 'the Athenian people is fully able to distinguish between good and bad citizens. But it prefers the bad, and hates the good; for it is convinced that the virtue of individuals is not beneficial but harmful to the welfare of the masses, and its object is, not the good organisation of the State, but the freedom and sovereignty of the masses.' [But Xen. (?) *de Rep. Ath.* is only an anti-democratic pamphlet, and should not be quoted as a serious authority.]

The Senate.

The constitution of Solon intended that the power of the *ecclesia* should be limited and to some extent directed by the *boulê* or senate, which was based by Solon upon the aristocratic organisation of the people into the four tribes. The members of the tribes were divided into four classes, of which the upper and richer had greater rights and duties to the State, so as to secure the preponderance in the senate of wealth and education. But from the time of Cleisthenes (B.C. 510) the institution fell more and more under the control of the masses. The senate of 500 became a small popular assembly, filled up without any regard to property or education. The members were not even elected, but were chosen by lot. They were divided, again by lot, into ten sections of fifty each (*prytanes*), which took it in turns to conduct business every thirty-six days. Such a body could not exercise any independent authority over the mass of the people, from which it rose to ephemeral power and then sank back into insignificance. It served merely to facilitate the initiation of business and to help the mob in the task of self-government.

The Archons.

The *archons*, originally important magistrates and belonging to the *eupatrids*, were to be chosen, according to Solon's constitution, from the richest class (the πεντακοσιομέδιμνοι). As the democracy developed, lot supplanted the previous qualifications of birth and wealth, and the archons were henceforth only servants of the *demos*, and powerless presidents of the numerous courts of justice. The latter also were democratically organised, and became a kind of popular assembly, in which no less than 6000 jurors took part; each case, according to its importance, was decided by a hundred or a thousand jurors. The desire of the masses to share in the profits and influence of justice, which Aristophanes scourged with his satire in the *Wasps*, became a chronic disease in Athens, and gave rise to the scandalous profession of the sycophants. The popular tribunals regarded themselves as the supporters and promoters of popular rule, busied themselves more with party

The judicial courts.

struggles and interests than with the impartial administration of justice, and became an arena for the strife of private and public passions. The corruption of sycophants and judges rapidly increased, and the forms of justice were abused by the arbitrary despotism of the mob[4].

[4] For the constitution of Athens, see Hermann's excellent book, *Griech. Statsalterthümer* (5. Auflage, 1875, neu bearbeitet von Bähr, p. 539 ff.).

CHAPTER XXI.

II. Criticism of Direct Democracy.

Characteristics of direct democracy.

The character of direct democracy, with its advantages and its evils, is represented for all time in the brilliant history of the gifted Athenian people.

Democracy prefers freedom to authority. To their love of freedom the Athenians owed the perfection of their works of art, which receive and deserve the admiration of posterity. But the democratic freedom of all involves the rule of all. The body of citizens wishes to govern in person, i.e. by great national assemblies. This is only possible in small States, and among a people which has leisure to devote itself to the regular business of the State; and this again presupposes either great simplicity of life and occupations, as in the small communities of mountain valleys, or else the existence of a labouring class which is not admitted to citizenship. Among a civilised people direct democracy is always a sham, because it cannot exist without this servile part of the population.

Danger of popular passion and caprice.

In these large popular assemblies a sense of unlimited power is easily developed, which leads to blunders of every kind, and often substitutes arbitrary caprice for law and right. The individual may be both honest and prudent in himself, but as a member of the assembly he is liable to be carried away by the passions of the crowd, and to consent to resolutions which, a short time before, he would have

unhesitatingly rejected. The orators can only influence by playing upon the popular passions, and when once the storm has been raised no feeling of shame can check its violence[1].

Importance of national character.

If, then, democracy is to be a good constitution, the majority of the citizens must possess political capacity and aptness, they must excel both in character and intelligence. Athenian history, however, offers the warnings of experience. Among a people of conspicuous intellectual development, whose character never appeared greater than in times of misfortune and danger, it was for a very short period that pure democracy could escape degeneracy and ruin. And even when Athens was at the zenith of its power and prosperity, its greatness was not due to the rule of the people but to the practical abandonment of that rule to a single great statesman. Thucydides says of the age of Pericles: 'Athens was a democracy in name, but in reality it was under the rule of the first of its citizens[2].'

The populace cannot long retain its virtue after having drunk the intoxicating wine of power. Democratic forms may exist as long as the people retains its dread of divine justice, its regard for the restraints of custom and law, and its reverence for the authority of the best men. There can be no doubt that in a democratic state the mass of the people are elevated by taking part in public affairs, and that they are distinguished from the citizens of other states by

[1] Burke expresses this admirably in his *Reflections on the Revolution in France* (Clarendon Press edition, p. 110): 'Where popular authority is absolute and unrestrained, the people have an infinitely greater, because a far better founded confidence in their own power. They are themselves, in a great measure, their own instruments. They are nearer to their objects. Besides, they are less under responsibility to one of the greatest controlling powers on earth, the sense of fame and estimation. The share of infamy that is likely to fall to the lot of each individual in public acts, is small indeed; the operation of opinion being in the inverse ratio to the number of those who abuse power. Their own approbation of their own acts has to them the appearance of a public judgment in their favour. A perfect democracy is therefore the most shameless thing in the world. As it is the most shameless, it is also the most fearless.'

[2] Thucydides, ii. 69.

a richer and more conscious development of their faculties. The individual is compelled to look beyond the narrow limits of his own occupation and becomes familiarised with the great laws of history and the collective life of nations. But fear and respect soon disappear as the feeling of unrestrained power gets the upper hand, and this power is the more readily abused as the distinction between rulers and ruled, which is recognised by other forms of State, is wanting in a democracy. The populace gives the rein to its evil passions: it envies and oppresses the nobler and better minority, whose existence is a standing reproach and protest against its own rule. The worst qualities of the *demos* come to the surface—pride, arbitrary caprice, the love of frequent and useless change, brutality: the less it rules itself, the more oppressive is its rule of others. Parties are formed whose mutual hatred is stronger than patriotism, and whose mortal struggles distract and ruin their common country. The State is endangered by incessant changes, and brought to ruin by the want of stability. Thus the Athenian State was brilliant in its greatness; but that greatness was short-lived, and was followed by a long decadence from which Athens never recovered [3].

The love of equality.

A characteristic of every democracy is the love of equality. In Athens this principle was developed more logically and one-sidedly than in any later democracy. Wherever it was possible the mass of the citizens acted for themselves, because a system of representation gives a certain preference and superiority to the chosen deputies. When it was necessary to appoint individuals to office or to the senate, the Athenians preferred the blind system of lot to election, which might have paid regard to superiority of intelligence and virtue. All magistrates were frequently changed, lest prolonged authority might exalt them above the mass [4].

[3] The great period of Athenian history began with Cleisthenes (B. C. 510), who founded the pure democracy, and ended with the death of Pericles (B. C. 428), so that it lasted only 82 years.

[4] Comp. Aristot. *Pol.* vi. 2. § 5, 1317 b. 20.

The very existence of magistrates who demand obedience, seemed contrary to the democratic maxim of equality: if such inequality was indispensable, it must be softened as much as possible by the use of the lot and by frequent change. The equality which commends itself to a democracy is equality of number. Its formula is not 'each according to his merits,' but 'one as another[5].'

Another consequence of democratic equality is *ostracism*[a]. Among the Greeks this was carried out openly and was regarded almost as an honour, but in modern states, though practically exercised, it is not formally recognised, and is usually regarded as a disgrace. Every constitution, if it wishes to last, must have the power of expelling elements which are incompatible with its existence. Democracy is not to be blamed when, as in Athens, it exiles individual citizens whose personal superiority is dangerous to the general equality. But it is a questionable proof of the merits of democracy that it can endure the baseness of the masses better than the superiority of individuals. Ostracism.

To sum up what has been said, it is evident that direct democracy, as it existed in Greece, is fitted only for small states, and especially for agricultural or pastoral peoples[6], whose life retains the simplicity of ancient customs. In the case of a people with a higher civilisation and wider relations, it may give a great momentary impulse, but it soon becomes insufficient and harmful. In the one case democracy appears both natural and moderate; in the other it is prone to licence and excess. The freedom which it promises becomes in this case the unjust oppression of all nobler elements, the unrestrained and brutal ambition of the mob. The equality on which it professes to be founded Direct democracy can only thrive in a small and backward state.

[5] The distinction is thus expressed by Aristotle (*Pol.* v. 1. § 12, 1301 b. 29; vi. 2. § 2, 1317 b. 4): τὸ ἴσον κατ' ἀριθμὸν ἀλλὰ μὴ κατ' ἀξίαν.

[a] [On ostracism cp. Arist. *Pol.* iii. 13. §§ 15–25, 1284 a. 17 ff.; Grote, *History of Greece*, Part ii. ch. 33.]

[6] Aristotle (*Pol.* vi. 4) developes this opinion, which had been confirmed by experience in Greece, and was so later in Switzerland.

is nothing but a manifest lie and a crying wrong, when once advancing civilisation has brought with it its differences and its contrasts [7].

[7] Cicero's observation is very true, *de Rep.* i. 26: 'quum omnia per populum geruntur quamvis justum atque moderatum, tamen aequabilitas est iniqua, quum habeat nullos gradus dignitatis.'

CHAPTER XXII.

III. Representative Democracy and the Modern Republic.

Direct democrary has only existed in modern times in very exceptional and very favourable circumstances, and then its form has been much more moderate than that of Athens. It is still visible in some of the mountain cantons of Switzerland, where every year the *Landsgemeinde* meets, and by the raising of hands distributes the offices and dignities of the little republic, usually to the most respected families, and gives its sanction to the laws which have been prepared by the councils. These simple democracies, little touched by the stream of European life, deserve our respect for their five hundred years of a history that is rich in manly episodes and rarely stained by acts of violence, for the simplicity of their customs and the peaceful and happy existence of their inhabitants. But in recent times they have been affected by the tendency to introduce the representative forms which prevail in the other Swiss cantons and in the United States of America. The French movements of 1793 and 1848 aimed at a representative constitution, and in the present day it is the ideal of democratic parties everywhere. The modern form of democracy may be declared to be *representative democracy*.

Direct superseded by representative democracy.

As constitutional monarchy originated in England, so representative democracy, or the modern form of Republic, as the Americans prefer to call it, was developed in North America. It is noteworthy that the two chief forms of the

1. Representative democracy originates in America.

modern State owe their origin to the political genius of the Anglo-Saxon race.

Causes of its origin.

Several causes combined to start and develope a new democratic constitution in America. It was only partially due to the extension of a territory which required hard toil before it could be made fit for cultivation. Earlier history had shown that extensive territories were not favourable to democracy; they had usually been colonised by great monarchies, and the colonists were kept in strict subjection. In South America new settlements had been founded and huge tracts of land had been occupied and made productive by a numerous population, but it was long before that part of the continent possessed a democracy. The real cause is to be found, not in the soil, but in the character of the men; but at the same time it may be allowed that the extent of territory gave freedom and security for development, while the hard struggle with nature created a spirit of manly courage and self-reliance.

New England.

The English colonists brought from their old home the love of self-government, liberty, and legality. In the new world they also found freedom from the oppression of feudal and aristocratic institutions. From the first complete equality prevailed among the planters. The Puritans, who settled in New England, belonged to the English middle class. Their religious belief was opposed to any ecclesiastical hierarchy; they wished to share in the common priesthood of Christians, and regarded each other as brothers. They sought the other side of the Atlantic to escape the persecutions of the episcopal Church and of the State which maintained it, to preserve their religious and their political freedom. Their ideas were at once theocratic and democratic. They did not rebel against the monarchical and parliamentary constitution of England, but they wanted to free themselves from the immediate oppression of the Government. The first agreement of the 'Pilgrim Fathers,' which all signed on their landing at Plymouth, throws light on the origin of North American democracy. 'In the

name of God, amen; we, whose names are underwritten, the loyal subjects of our dread sovereign King James, having undertaken, for the glory of God, and the advancement of the Christian faith, and honour of our king and country, a voyage to plant the first colony in the northern parts of Virginia, do, by these presents, solemnly and mutually, in the presence of God and of one another, covenant and combine ourselves together into a civil body politic, for our better ordering and preservation, and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute, and frame, such just and equal laws, ordinances, acts, constitutions, and offices, from time to time, as shall be thought most convenient for the general good of the colony. Unto which we promise all due submission and obedience.' Similar proceedings were taken by the first emigrants to Rhode Island, Newhaven, Connecticut and Providence. Thus these communities, which formed the New England group of colonies, with Massachusetts at their head, adopted a form of government which appeared as the joint work of free men.

Virginia.

Wholly different from this were the conditions of the southern group, which was at first called Virginia, until the name was afterwards confined to the most important of the colonies. There the episcopal Church, with its aristocratic constitution, found ready recognition. Although most of the planters belonged to the middle class, the settlement was directed rather by economic than by religious interests, and moreover several members of the aristocracy held large estates there. Later the population was recruited by the arrival of numerous adventurers, and of the criminals and vagabonds who were transported by the London police.

Carolina.

Still, even in Virginia, it was found impossible to transplant the aristocratic constitution of England, and the notable attempt which was made by Locke at Shaftesbury's request to draw up a similar constitution for Carolina (1669) was a complete failure. The colonists had no wish to become tenants of the proprietaries landgraves and caciques

(barons), when they might be free proprietors elsewhere, and in 1693 Locke's constitution was abolished. Both in the northern and southern colonies the planters, prevented by the great distances from meeting in person, instituted representative assemblies composed of freely elected deputies, which exercised the autonomy of the colony and controlled the administration. The germs of the institution may be traced as far back as 1619, and it was soon adopted in all the colonies.

New York and Pennsylvania.

There was a stronger intermixture of foreign elements in the central group, of which New York, originally New Amsterdam, and Pennsylvania were the most prominent. But there too, the influence of the English race led to the adoption of the same constitution in essentials. The points in which all the colonies were alike, may be thus enumerated :—

Common elements of the colonial constitutions.

(*a*) English, law without either landlords or feudal tenure: free property in the soil was the basis of the economic system.

(*b*) Essential equality of position and rights, and the absence of any aristocracy like that which still held power in England. This equality was, however, broken by marked differences of race. The Red Indians, the original inhabitants of the country, were not placed on a level with the white men, nor admitted to share in the government of the community; but they had special rights and laws of their own. Far lower was the position of the Negroes, the descendants of imported slaves from Africa. They were usually the property of the white planters, but in the exceptional cases when they obtained freedom they were never admitted to the political rights of citizens.

(*c*) The constant habit of self-reliance in contrast to State-aid. This is visible at the time of the first settlement, when the neighbours helped each other to build block-houses.

(*d*) The general education of the people by means of national schools. These were founded very early by the

villages for their own youth, and in many colonies attendance was made compulsory.

(*e*) A free constitution of the villages, and independent administration of the counties.

(*f*) The small number of officials. Of these the most important was the governor of a whole colony, who was elected by the planters in the chartered colonies. nominated by the proprietors in the proprietary, and by the English Government in the crown colonies. Next to him came the presiding judges. Both had to act in co-operation with representatives of the citizens, the governor with his councillors, the judge with the jurors. The justices of the peace, who were nominated in England by the king from among the gentry, were in America always free tillers of the soil.

(*g*) Hardly any standing troops, their place being taken by the militia.

(*h*) The existence of a House of Representatives, elected in each colony by the free men, which acted with the Senate in making laws, but by itself granted taxes and controlled the administration.

(*i*) The custom of short tenure of offices, so as to provide for frequent changes.

(*k*) Lastly, the gradual development of a free press and freedom of combination.

On these foundations an independent representative constitution, at first encouraged by the Crown, was built up in each colony long before the separation from England. When the declaration of independence (1776) broke off the connection with the English king and Parliament, the new republics were at once complete.

The Federal constitution of the Union (1787) was only the logical application of these provincial institutions on a grand scale to the collective State then formed. The Union.

The new form of State was imitated by the French in the constitutions of 1793 and 1795, and again in 1848 and 1870, but without permanent success. The political ideas of 'liberty, equality, fraternity,' were adopted with pas- 2. France.

sionate devotion by the French; but their traditions were monarchical, and their customs very slightly republican. They have always been inclined to call in State aid rather than to help themselves, to prefer the glory and power of the State to legality or the unassuming labour of constitutional life. The French tendency to centralisation has always been more in favour of monarchy than of a republic[e].

3. Switzerland.

On the other hand, the representative democracy of America found a soil ready prepared for it in Switzerland, to which it was transplanted by French intervention.

In Switzerland the greater cantons were aristocratically governed; some, as Bern, Fribourg, Soleure, and Luzern, by a hereditary class of patricians, others, as Zürich, Basel, and Schaffhausen, by the exclusive corporation of burghers. But communal liberty had been retained as the basis of the cantonal organisation, and the Republic, the political ideal of the people, had a deep root in the popular character and customs. There were no standing troops and no permanent officials. The independence of Switzerland had been won in a struggle with princes and nobles. It was therefore nothing unnatural when, in harmony with modern theories, civil liberties were extended to all classes and to the whole country, and the aristocratic privileges of the patricians and burghers were abolished. This completed the change from an aristocratic to a representative republic[1].

The attempt of 1798 to form the whole of Switzerland into a united representative democracy was not permanent. The traditions of independence in the older cantons and the elements of internal opposition were too strong to admit

[e] [A Republic has been established in France ever since 1870, and the prospect of a royalist restoration seems now to be almost hopeless.]

[1] Act of Mediation, 1803, xx. 3: 'Il n'y a plus en Suisse ni pays sujets, ni privilèges de lieux, de naissance, de personnes ou de familles.' See Bluntschli, *Schweizerisches Bundesrecht*, i. 474. Federal Const. of 1848 and 1874. art. 4: 'In Switzerland there are no subjects, and no privileges of place, of birth, of family, or of person.'

of submission to the Helvetic Republic, which was soon dissolved. But in many cantons, and especially in the towns and the new cantons, representative forms were retained, in spite of the partial reaction in favour of aristocratic privileges which followed 1814. The reforming movements after 1830 gave freer expression to the representative form, and in 1848 it was applied to the Confederation [b].

4. Differences of ancient and modern democracy.

Modern democracy is essentially different from the old Greek form. The Persian Otanes (in Herodotus, III. 82) enumerates five characteristics of ancient democracy: (1) the equality of all rights (*ἰσονομία*); (2) the rejection of arbitrary power like that exercised by the oriental despots; (3) the appointment to offices by lot; (4) the responsibility of officials; (5) common deliberation and decision in the popular assembly. Three of these are admitted in the modern State, in constitutional monarchy as well as in the republics; but the other two, appointment by lot and the popular assembly, are rejected.

The ancient democracy admitted all citizens equally to a share in the government; the modern democracy introduces an aristocratic distinction in the election of the best men as representatives, and is thus a nobler form of democracy. The right of sovereignty is ascribed to the whole body of citizens, to the people, but the exercise of that right is entrusted to the most eminent men, to the representatives of the people.

The citizens still take a *direct* part in public affairs in the following points:—

(*a*) In the voting on constitutional laws. In Switzerland the principle has been generally recognised since 1830, that constitutional laws require the consent of a majority of the citizens, not reckoning those who abstain from voting [a]. In

[b] [For the Swiss Constitution of 1848, see Laferrière et Batbie, *des Constitutions d'Europe et d'Amérique* (Paris, 1869), pp. 84–102.]

[a] Const. of Zürich, 1831, § 93: 'If the proposal (of a constitutional change which has been twice discussed by the Grand Council) is

the United States, on the other hand, the vote is entrusted, not to the whole people, but to a numerous assembly of representatives specially selected for the purpose (Convention).

(*b*) Sometimes in the voting on other laws. In this case the popular decision takes either the positive form of sanction (*referendum*) so that the acceptance of the citizens gives validity to a law, or the negative form of a veto which enables the citizens to reject a law after it has been carried by the representative chambers. In the latter case the number of those voting against the law must exceed half of the whole body of citizens; while in the former case a simple majority of those voting is decisive. Both forms are borrowed from pure democracy, and as they may easily give rise to agitation among the masses, they involve danger to the interests of civilisation and culture. They were first adopted by some of the separate democracies of Switzerland, and in 1874 were introduced into the Confederation[8].

(*c*) In the election of members of the legislative body. These elections are usually based upon the mathematical principle of equal electoral districts and the counting of heads, but occasionally upon organic divisions, e. g. the communes. The representation is therefore usually incomplete, and is determined too much by party tendencies. This defect is by no means inherent in or confined to representative democracy; it is equally manifest in constitutional monarchy.

The sovereignty in representative democracies.

The regular exercise of the supreme power is usually entrusted to large assemblies, which are chosen as the most perfect and complete representation of the sovereign people.

accepted, it must be submitted to the whole body of citizens for their acceptance or rejection.' Federal Const. of 1848 and 1874, art. 6: 'The Federation undertakes to guarantee the cantonal constitutions, provided that they have been accepted by the people and can be revised if an absolute majority of the citizens demands it.'

[8] Federal Const. of 1874, art. 89: 'Federal laws or decisions binding the whole Confederation, which are not of urgent importance, are to be submitted for the acceptance or rejection of the people, if this is demanded by 30,000 qualified Swiss citizens or by eight cantons.'

In Switzerland during the middle ages, the Grand Councils of the towns, and the *Landräthe* of the rural cantons, were only extensions of the real Councils, in which authority was concentrated, by the addition of committees of other members of the canton for important business, and in the towns for legislation as well. In the present day the Grand Councils are separated from the government, raised above it, and exalted to be the authorised holders of the sovereignty[4]. The federal assembly (*Bundesversammlung*), which consists of two councils, occupies a similar position with regard to the federal government[5].

In North America both the National Congress and the legislative bodies of the separate States are composed of two chambers, and are still more distinctly separated from the government.

The administrative power.

In *government* the people have no longer any direct share, even in those states which have kept pure democracy for legislative purposes. Everywhere the work of government is entrusted to authorised representatives who carry it on in the people's name. In some states the choice of the head of the government is made directly by the people. For instance, the governors of most of the American states and the town councillors of Geneva are elected by the whole body of citizens[6]. The President of the United States is chosen

[4] Const. of Zürich, 1831, § 38: 'The exercise of the supreme power in accordance with the constitution is entrusted to a Grand Council. It has in its hands the making of laws and the superintendence of the local administration. It represents the canton in its external relations.' Cherbuliez, *De la Démocratie en Suisse*, ii. pp. 35 ff.

[5] Federal Const. of 1848, § 60: 'The supreme power in the Confederation is to be exercised by the Federal Assembly, which consists of two parts, the National Council (*Nationalrath*) and the Council of Estates (*Ständerath*).' Federal Const. of 1874, art. 71: 'With reservation of the rights of the people and of the cantons, the supreme power in the Confederation is to be exercised by the Federal Assembly.'

[6] So in the French Constitution of 1848, art. 43: 'Le peuple Français délègue le pouvoir exécutif à un citoyen qui reçoit le titre de Président de la République.' [Bluntschli apparently meant to refer to art. 46 of the constitution: 'Le Président est nommé, au scrutin secret et à la majorité absolue des votants, par le suffrage direct de tous les électeurs des départements Français et d'Algérie,' Laferrière et Batbie, p. cxxxviii.]

by electors, who in their turn have been chosen by the primary electors. In others, on the other hand, the choice is in the hands of the legislative body, which thus represents the people in appointing to the chief offices. The latter system prevails in most of the Swiss republics, where the Grand Council appoints both the government and the chief judges, in France, and in a few of the American states. Under the first system the government is obviously more independent and powerful, especially in relation to the chambers, because it can claim to be equally representative of the people, and to have received still greater proofs of the public confidence. Under the latter the government is more dependent on the legislature to which it owes its existence; and therefore there is less possibility of making each power limit and restrain the other[c].

Jurisdiction.

Jurisdiction is also exercised in the name of the people, but the judges, who require special qualities and training, are usually nominated either by the government, as in the United States and republican France, or by the legislature, as in Switzerland. But a direct share in jurisdiction is given to the people by the jury system, as the jurors are selected by lot from among the whole body of citizens.

Local administrations.

In every representative democracy the communal constitution is of especial importance, and forms the solid foundation of the whole organisation. In the communes the burghers are trained in public affairs, in self-government, and civil freedom. In them, at least in the smaller and rural communes, it is still possible for all the citizens to meet in the communal assembly, though in the towns this is also formed by representation. The republics of Switzerland and North America can both trace their foundation

[c] [The important difference between these two ways of electing the head of the executive government is well illustrated in the French Constitution of 1848. M. Grévy proposed that the President should be elected by the National Assembly, but it was decided that he should be chosen by universal suffrage. The result was to create two equal powers, the President and the Assembly, without any means of settling a dispute between them. This state of things enabled Napoleon III to establish the Second Empire.]

historically to a free communal constitution; and if this is not true of France, it only furnishes another proof that the French have no natural tendency to a republican government.

Leaving on one side the very slight direct share of the people in their own sovereignty, we see that in representative democracy the rule is that *the people governs through its officials, while it legislates and controls the administration through its representatives.* On this point the modern constitution shows a marked resemblance to those states which draw a distinction between the rulers and the ruled.

CHAPTER XXIII.

IV. Consideration of Representative Democracy.

Montesquieu declared the principle of democracy to be *virtue*. But virtue, as a political principle, presupposes, not the equality of all, but a respect for the moral worth of the rulers, which is not to be found in pure democracy. All that we can say is that a certain measure of virtue in the mass of the people is an indispensable practical necessity for a good democracy, and that the want of it must involve speedy ruin. It may rather be maintained that virtue has been made the political principle of representative democracy, which is not only a more moderate but also a nobler form of democracy, because in the system of election it borrows some of the advantages of aristocracy.

Difficulty of securing the best representatives.

Its principle is that the best men of the nation govern in the name and by the commission of the nation. But the great difficulty lies in organising the elections so as to secure that the best men both in intellect and character shall be chosen.

The democratic tendencies of the present day are in favour of regulating elections simply by the *number* of electors. Democracy, placing, as it does, great value upon equality, readily adopts mathematical rules for its institutions; it counts the citizens, and assigns equal rights to an equal number.

Danger of regarding quantity rather than quality.

But this system is better suited to direct democracy, which extends the exercise of power to all citizens alike, than to representative democracy, which distinguishes citizens according to their worth, and only entrusts the ad-

ministration of public affairs to the better among them. Thus the latter form regards the *quality* of the elected, and it is unnatural that it should regulate the electoral divisions simply by *quantity*. Moreover the defects of the system are far more harmful in the representative state. The popular assembly of a direct democracy is not merely a mass of individuals with equal rights; it is readily influenced by the magistrates, by the great orators, and the most respected citizens; the decision of the majority will probably correspond to the true character of the whole nation. But in a representative democracy the nation is not thus united; on the contrary, it is divided into a number of scattered units, which may be equal in number, but which in regard to quality stand in a wholly different relation to the whole, and are therefore very unequal parts of the nation. Is it possible to maintain that the rural districts of Brittany or the manufacturing districts of Lyons at all resemble the electoral divisions of Paris, where one finds mixed together without real union the wealthiest and most educated members of the community, the numerous grades of simple burghers and artisans, and a low rabble such as cannot be paralleled elsewhere in France? This difference in the electoral districts demands logically that a different value shall be placed upon their votes. True representation can only be secured by arranging the elections so that *every element and every interest in the nation shall be represented in proportion to its relation to the whole.* Number has a certain value, but it is not sufficient by itself. Other qualities, such as property, education, occupation, and mode of life, must also be regarded; and it is best to do this in connexion with organic parts of the nation rather than with merely arbitrary subdivisions.

Practical rules.

We may thus lay down two fundamental principles for representative democracy.

(1) Whenever the whole body of citizens act together, or when a vote is given by the whole nation, it is enough to reckon merely the number of votes, as in a direct democracy.

(2) On the other hand, the mere counting of votes is insufficient when parts of the nation are electing representatives for the whole. The parts must be arranged according to quality, so as to guarantee the election of the best men, and to give due proportion to the intellectual, moral, and material elements of the nation.

Advantages and disadvantages of representative democracy.

The peculiarity of representative democracy is that it ascribes the right of sovereignty to the majority, but entrusts its exercise to the minority. To secure that the minority shall rule according to the wishes of the majority, the latter reserves to itself the choice of those who are to act in its name, and new elections are held at short intervals of time.

This constitution recognises that the majority has neither the leisure nor the ability actually to exercise the self-government which it claims as its natural right. But it credits the majority with sufficient intelligence and interest in the State to take part in the elections, and to find the ablest men for its representatives.

It demands less from the citizens than direct democracy, but more from the representatives. It relies upon the self-confidence of free and equal citizens, but at the same time it trusts that they will be modest enough to elect their best men, and to submit willingly to the rule of their representatives as long as these retain the confidence of the majority.

Weakness of authority.

The frequent elections make the rulers dependent upon the ruled, and yet the latter have to obey during the interval. The freedom of the subjects is more securely founded than the authority of the government. The chief magistrates are regarded rather as the servants than as the heads of the republic. Although, according to Guizot, a state can only be ruled from above and not from below, representative democracy tries to maintain as much as possible the appearance of being ruled from below. Thus the government comes to resemble a mere *administration*, and the State is like a *commune* on a grand scale or a great economic institution (*Wirthschaft*).

The weakness of authority shows itself least in the legislative bodies; in fact there is a danger that the representatives may identify themselves altogether with the nation and may be carried away by the illusions of omnipotence. The government, on the other hand, has great difficulty in making its authority really strong and vigorous. The frequency of elections makes its position insecure and dependent upon the changeable opinions of the people. It is only powerful as long as it is supported by the majority, and it can only carry out extensive and far-reaching plans, when these are in accordance with the instincts or traditions of the nation, and thus contain a security for their permanence.

Want of pomp and concentration.

The organs of government have an unassuming and civic appearance. There is none of the pomp and majesty with which monarchy and aristocracy are surrounded; the soil is too natural for the artificial forms of court diplomacy; democracy prefers to be represented by simple *chargés d'affaires* or consuls. A great standing army would be a constant menace to its security and its freedom, and it has to maintain a large militia and *Landwehr*. The concentration of all forces is less developed than the independent decision and free movement of every part.

Excellence of public institutions.

The institutions for the public service are usually good, and sometimes excellent. In a democracy one expects to find numerous establishments for useful and charitable purposes, good roads and means of communication, numerous national schools, cheerful festivals, etc., and moreover one is less plagued with bureaucracy and red-tape.

Neglect of culture.

On the other hand, there is more difficulty than in other constitutions to induce the State to attend to the loftier interests of art and science. A democratic nation must have reached a very high stage of civilisation when it seeks to satisfy needs of which the ordinary intelligence cannot appreciate the value or the importance to the national welfare.

Elevation

The manly consciousness of freedom, which creates and

of public character.

finds expression in the constitution, elevates the middle classes who form its chief support; while the direct or indirect contact with public affairs developes the intelligence and strengthens the character of the citizens. There is a wide foundation and free play for patriotism, and in times of crisis the citizens are willing to make great sacrifices for their country. To aristocratic dispositions the constitution offers less opportunity for development, and the people often display mistrust or hostility towards them. But even they can earn respect, if they will refrain from wounding the feeling of equality by haughty pretensions, and if they enter into rivalry with the best of the democrats in zeal and devotion for the public good.

Note.—Robert v. Mohl (*Encyclopädie*, p. 346) has contested the assertion made above, that in a representative democracy the principle of number ought not to be absolutely decisive. He says: 'However true it may be in general that the right of taking part in an election ought not to be regarded as a personal right of the individual, but rather as a delegated function or office, yet this does not apply to the exercise of the sovereignty of the people by representation. The sovereignty of the people is based upon the innate right of the individual to a share in the government.' I allow that this is the view of the modern democratic theory, especially as it was formulated by Rousseau. But the result is that it has never emerged from the confusion of personal with public rights, and its so-called social state is only the patrimonial state reversed. The error is obvious to every one who has grasped the distinction between the unity of the nation and the aggregate of the citizens. An elector derives his right to vote, not from nature, but from the State. Every system of election is an institution of the State for public ends. [On the subject of this chapter, see Mill, *Representative Government*.]

CHAPTER XXIV.

COMPOSITE FORMS OF STATE.

HITHERTO we have considered only *simple* States. But States are also *composite*, when they consist of parts which are also States or are organised like States. In them the differences between the simple forms are repeated, and so far there is nothing specially notable about them. For example, both the collective and the separate States, or the chief State and its dependencies, may be organised as monarchies or as representative democracies. Various forms of Composite States.

But it may happen that the collective and the separate States have different constitutions. The German Confederation of 1815 remained an oligarchy of sovereign princes, without popular representation, while constitutional monarchy was gradually introduced in the individual States composing it. Some of the Swiss Cantons are still direct democracies, whereas the Federation is a representative democracy. England possesses a constitutional monarchy, but the English dependencies in Asia are absolutely ruled, and some of the colonies elsewhere are half-sovereign republics under British suzerainty and protection.

Where there are great differences in nationality, civilization, and historical conditions, a difference of constitution is natural and justifiable; but where these conditions are the same, as in the German Confederation, such a difference is contrary both to nature and harmony.

In all composite States we meet with a new distinction (*Gegensatz*), viz. that between the power of the collective or chief State, and the independence of the separate States or dependencies.

With regard to this point we may make the following subdivisions:—

1. The absolute rule of one state over others.

1. A chief State ruling absolutely over subject dependencies. To this class belong many possessions of the European powers, especially in Asia and Africa. The chief State alone has a free organisation, the dependencies are unfree and subject to foreign rule. The opposition between the States is very marked, and all the energy of the ruling State is needed to avoid a conflict[1].

2. The suzerainty or protectorate of one state over others.

2. The suzerainty of one State over vassal States, or the protectorate of a strong State over less powerful dependencies. Here a certain amount of independence is possible for the vassal or protected States. The Holy Roman Empire is a mediæval, and the Turkish Empire a modern example of a body politic composed of vassal States. In modern times the protectorate is preferred to suzerainty, although the former has no meaning except when there is a great disproportion of power, and can never commend itself to a free nation. Examples of it may be seen in Napoleon's protectorate over the Confederation of the Rhine, in that of England over the Ionian Islands[a], and that of the European powers over Moldavia and Wallachia[b].

3. The rule of the mother-country over colonies.

3. Closely related with the above, but modified and ennobled by filial loyalty, are the relations between the mother-country and its colonies, which are not yet independent, but have almost developed into complete States.

[1] See Mill, *Representative Government*, ch. 17.

[a] [This protectorate was voluntarily abandoned by England in 1863 on the accession of Prince George of Denmark to the throne of Greece as George I.]

[b] [This protectorate was established in 1856 by the Treaty of Paris. In 1858 the six powers concluded a Convention with the Porte to settle the government of the two provinces. In the next year the provinces effected their own union by electing the same prince, and have since become the state of Roumania.]

Even after the internal administration of the colony has become substantially independent, it continues to need the protection of the mother-country in its external relations, and is therefore willing to acknowledge a relative superiority. The first example of this was seen in the relations of Canada with England.

4. In a Confederation (*Staatenbund*) or Personal Union [2] the connected States have usually their full dignity and independence, although these may be restricted in exceptional cases when common interests require it. The separate States have a complete organisation, but the combination is undeveloped and has no personality of its own except in special, and mostly external, relations. It is rather a conglomeration of States than a real State, as it wants the necessary organs for legislation, government, and jurisdiction. It stands halfway between a permanent international alliance and a constituted State, and is therefore an incomplete and transitional form. 4. Confederation or Personal Union.

In this form there may be a common people, but there is no real united nation, and the collective life and power are developed with great difficulty. This last defect is less conspicuous in a Personal Union, which at least possesses a single head in the common monarch, than in a Confederation, which has no united organ whatever. Both forms are completely unfitted for action. The German Confederation of 1815 is the best example of such a system in modern times, and the most eloquent witness to its defects.

5. A Federation (*Bundesstat*), Federal Empire (*Bundesreich*) and Real Union [3], have this in common, that both the collective (*Gesammtstat*) and the particular States (*Einzelstaten*) have a complete organisation. In a Federation the particular States are more independent, because each has a government exclusively belonging to itself; whereas, in a Real Union, the head of the collective State is also a 5. Federation, Federal Empire, and Real Union.

[2] See above, Book IV. ch. iii. p. 271.
[3] See above, Book IV. ch. iii. p. 272.

territorial prince in his own territories (*Kronländer*), and these are therefore less sovereign [c].

In a Federation and a Federal Empire there is an organised nation, and at the same time the peoples of the particular States also possess organic unity. Thus we speak of Americans, and also of Pennsylvanians and Virginians; of a Swiss nation, and of Bernese and Genevese; of Germans, and of Prussians, Saxons, Bavarians, etc. The collective State is as free in its movements and as well provided with organs as the simple State. But the separate States are not at all vassals: within their sphere they are as independent as simple States [4].

Necessary conditions of composite States.

The co-existence of two kinds of States on the same territory is rendered possible by (1) a precise distinction between the *powers* of each, and by making provision for the peaceable settlement of disputes; and (2) by keeping the governments and the representative bodies as separate and as independent as possible. This separation of persons and functions is most complete in the United States; the distinction of powers is very carefully regulated in the Swiss constitution [5]. In the German Empire the organs of the

[c] [Bluntschli seems here to confuse independence in relation to the head of the collective State, with independence in relation to the collective State itself.]

[4] G. Waitz, *Grundzüge der Politik*, p. 44: 'Both powers, that of the Confederation and that of the separate States, must be independent (sovereign) in their own sphere: neither must receive delegated power from the other.' Since 1871 numerous publications have appeared about the nature of Federations in general, and especially about the legal constitution of the German Empire, but as yet no satisfactory solution of the difficult problem has been offered. The view in the text, which was originated by De Tocqueville and developed by Waitz, is opposed to the essence of sovereignty as the highest power in the State and therefore indivisible both in respect of sphere and objects. See Seydel, *Zeitschrift für Statswissenschaft*, xxviii. 185 ff. Laband, *Statsrecht*, i. 70 (also in Marquardsen, *Handbuch des öffentlichen Rechts*, Part II, p. 15 ff.). Jellinek, *Lehre von den Statenverbindungen*, pp. 16 ff. and 253 ff.

[5] See Rüttimann (*Das nordamerikanische Bundesstaatsrecht verglichen m. den politischen Einrichtungen der Schweiz*, 2 Thl., Zürich) on the means which the Swiss Federation has at its disposal to enforce the federal laws.

Federal Government are closely connected with those of the separate States, although the Prussian king, as Emperor, assumes the position of a single head of the Federation, and although the Diet is completely distinct from the Chambers of the separate States. The respective powers of the Federation and its members are not at all clearly distinguished, in fact they have been purposely left indeterminate. But there is ample security for the independence of the separate governments, and for the prevention or speedy settlement of disputes, in the regulations, that an imperial law always overrides a provincial law, and that the consent of the Federal Council is necessary for every imperial law.

It is usual to consider that the collective State busies itself with external affairs as a rule, and with a few internal matters of common importance as an exception; while the independence of the separate States applies to internal administration, and only very exceptionally to external relations.

BOOK VII.

SOVEREIGNTY AND ITS ORGANS.

PUBLIC SERVICE AND PUBLIC OFFICES.

CHAPTER I.

THE CONCEPTION OF SOVEREIGNTY.

THE State is the embodiment and personification of the national power. This power, considered in its highest dignity and greatest force, is called Sovereignty.

The name Sovereignty arose first in France, and the conception was first developed by French science. Bodin made it a fundamental conception of Public Law. Since then the word and the notion have exercised great influence on the development of modern constitutions and on the whole politics of modern times. The term 'Sovereignty.'

In the middle ages the expression Sovereignty (*suprema potestas, supremitas*) was used in a still wider sense. Every authority which gave a final decision, so that there was no appeal to a higher authority, was called sovereign. The highest courts of justice were called *cours souveraines*. Thus a State contained a great number of sovereign offices and corporations. Gradually, however, the name ceased to be given to mere branches of administration, and came to be limited to the one highest ruling power in the State, and the conception was applied only to the concentrated power of the State.

From the sixteenth century the notion was entirely dominated by the centralising tendencies of French politics and the efforts of the French kings to obtain absolute power. Conception of Sovereignty in France.—Sovereignty

as absolute power.

Bodin declared sovereignty to be the absolute and perpetual power of a State (*puissance absolue et perpétuelle d'une république*): and this sense prevailed. Louis XIV and the Jacobins of the Convention of 1793 alike regarded themselves as omnipotent[1]. Both were wrong. Modern representative government knows nothing of absolute power, and there is no such thing upon earth as absolute independence. Neither political freedom, nor the right of the other organs and elements of the State, are compatible with such unlimited sovereignty, and wherever men have attempted to exercise it, their presumption has been condemned by history. Even the State as a whole is not almighty, for it is limited externally by the rights of other States, and internally by its own nature and by the rights of its individual members[2].

German terms for Sovereignty.

The German language has no completely equivalent expression. The word *Obergewalt* (superior power), or, as the old Swiss expression ran, '*die höchste und grösste Gewalt*[3]' (the highest and greatest power), signifies authority only on its inner side, and not independence externally. The word *Statshoheit* signifies the dignity (*majestas*) rather than the power of the State. *Statsgewalt* implies power rather than dignity. We are therefore compelled, in order to express what is implied in Sovereignty, to use both words, *Statshoheit und Statsgewalt*. At the same time the German expressions have this advantage—that they are less liable than the French to be misunderstood as if they implied absolute power.

[1] Thiers, *Hist. de la Révol. franç.* ii. p. 200, says that in the opinion of the Jacobins, 'The nation can never renounce the power of doing and willing at all times that which it pleases: this power constitutes its omnipotence (*sa toute-puissance*), and this is inalienable. Thus the nation *could not* bind itself to Louis XIV.' The Abbé Sieyès recognised the error in this theory. Cp. Bluntschli, *Gesch. d. Statsw.* p. 326.

[2] Hanoverian Declaration of 1814, in Hormayr, *Lebensbilder*, i. p. 111; 'The rights of sovereignty do not imply any idea of despotism. The King of Great Britain is undeniably just as much sovereign as any prince in Europe, and the liberties of his people establish his throne, instead of overthrowing it.'

[3] Blumer, *Rechtsgesch. der Schweizer Demokratien*, ii. 140, 141.

Characteristics of Sovereignty.

Sovereignty implies :—

1. Independence of the authority of any other State. Yet this independence must be understood as only relative. International law, which binds all States together, no more contradicts the Sovereignty of States than constitutional law, which limits the exercise of public authority within. Even the separate States (*Länderstaten*) in a composite State may be regarded as sovereign, although dependent in essential matters, e. g. foreign policy and control of the army.

2. Supreme public dignity—what the Romans called *majestas.*

3. Plenitude of public power, as opposed to mere particular powers. Sovereignty is not a sum of particular isolated rights, but is a general or common right: it is a 'central conception,' and is as important in Public as that of property is in Private Law.

4. Further, it is the highest in the State. Thus there can be no political power above it. The French Seigneurs of the middle ages ceased to be sovereign when they were compelled to submit in all essential matters to the king as their feudal lord. The German Electors were able to maintain sovereignty in their own dominions from the fourteenth century [a], because they exercised supreme authority in them as their proper right [4].

5. Unity, a necessary condition in every organism [5]. The division of sovereignty paralyses and dissolves a State, and is therefore incompatible with its healthy existence.

[a] [The superior authority of the Electors, as compared with that of the other German princes, was based upon the Golden Bull, issued by Charles IV in 1356.]

[4] The draft of the Treaty of Westphalia (1648) in saying 'que tous les princes et Estats seront maintenus dans tous les autres droits de *souveraineté*, qui leur appartiennent,' used an expression which was new to Germany, *souveraineté* instead of *Landeshoheit*, evidently with the intention of relaxing the bonds of the Empire. But as a matter of fact most of the German princes were already almost 'sovereign.'

[5] Imman. Herrm. Fichte, *Beiträge zur Statslehre*, 1848, goes too far in declaring that sovereignty is only the '*unity* of the government' (*Einheit der Regierung*). Complete power and majesty form the essence of sovereignty.

Notes.—1. Rousseau, whose theories were translated into fact by the French Revolution, based Sovereignty on the 'general will' (*la volonté générale*), and thus made the mistake of substituting *suprema voluntas* for *suprema potestas*. He then argued that since 'power may be transferred but not will' (*Contr. Soc.* ii. 1), Sovereignty is inalienable—a conclusion belied by history. He understands Law [Bluntschli says *das Recht*, but Rousseau, ii. 6, says *la loi*, holding that 'dans l'état civil tous les droits sont fixés par la loi'] as the product and not as the limitation of arbitrary will. In 'Will' he forgets 'Ought'; and this original error is the source of many others. The Will is a manifestation and expression of the human spirit; but not like Sovereignty a legal institution in the State (*eine Rechtsinstitution des States*). Will may animate the exercise of Law and effect changes in it, but is not of itself Law (*ist für sich kein Recht*). The Will of the Sovereign presupposes Sovereignty, not *vice versâ*.

2. It is illogical to consider Sovereignty as the source of the State and of Law, and to put the Sovereign above the State. The power and majesty of the State presuppose the States. Thus Sovereignty is a conception of Public Law, and not superior to it (*überstatsrechtlich*).

3. Const. Franz (*Vorschule d. St.* p. 32) declares that after *power* 'the self-consciousness of the State' is the chief attribute of Sovereignty. But Consciousness, though necessary for the exercise of a Right and for the administration of Law, is not an attribute of Right or Law itself.

CHAPTER II.

SOVEREIGNTY OF THE PEOPLE OR OF THE STATE, AND SOVEREIGNTY OF THE RULER.

To whom belongs Sovereignty? Political parties are inclined to answer this question in different ways. Even the scientific student has many difficulties and prejudices to remove.

1. Sovereignty of the People as the sum of individuals. This is anarchy.

An opinion, widely diffused since Rousseau and the French Revolution, assigns sovereignty to the people. Yes; but who are the people? According to some, simply the sum of individuals united into the State: that is to say. the State is resolved into its atoms, and supreme power is ascribed to the unorganised mass, or to the majority of these individuals. This extreme radical opinion contradicts the very existence of the State, which is the basis of sovereignty. It is not compatible with any constitution, not even with the absolute democracy which it professes to found, for even there it is the ordered national assembly (*Landsgemeinde*), not the crowd of atoms, which exercises the authority of the State.

2. Sovereignty of the People as the citizens in their assemblies. This only possible in direct democracy.

Others understand the equal citizens collectively voting in one or more assemblies, i. e. they think of the sovereignty of the *demos* in Democracy. The principle of the sovereignty of the people thus understood, and limited to this form of government, has a meaning and a truth: it is exactly the same as Democracy. But in representative Democracy the principle cannot be exactly applied, because, as a rule, supreme power is exercised, not directly by the citizens, but

indirectly by their representatives. It is quite incompatible with all other forms of government; for it would imply that the head of the State is on a level with the humblest citizen, and it would subject the rulers, as a minority, to the majority of subjects. This is to turn the body politic upside down, and to put the feet in the place of the head.

3. Yet these views have been put forward as universally valid.

Sometimes the two preceding opinions pass into one another. The first is anarchical, the second absolutely democratical; and yet their defenders commonly maintain that they are universally valid. But this is just what is dangerous in these theories: they imply and demand the overthrow of all other constitutions except direct democracy.

Parties completely opposed[1] have maintained these opinions, but they have always been parties which were discontented with the existing constitution or government, and were seeking to overthrow it. In the hands of the French Revolution the sovereignty of the people became a

[1] We allude here to the theory of the General of the Jesuits, Lainez, and to the Jesuits Bellarmin and Mariana, who took 'the sovereignty of the people' under their protection, in order to maintain the supremacy of the Church over the State and of the Pope over Kings; Kings deriving their authority from the people, the Pope alone from God. Cp. Ranke, *Hist. polit. Zeitschrift*, ii. p. 606 ff. (On the rise of the doctrine of the sovereignty of the people and its development in the sixteenth and seventeenth centuries, by the Jesuits on the one hand, and the philosophic Jurists on the other, see the works of Gierke, *Johannes Althusius u. die Entwicklung der naturrechtlichen Statstheorien* (1880), p. 123 ff.: *Genossenschaftsrecht*, iii. 568 ff.). But the influence of Rousseau was of far more importance in spreading this doctrine. According to him, the sovereign is the multitude of individuals united by the social contract: each is at the same time member of the sovereign and subject to the sovereign. Sovereignty is nothing but the general will, and that is inalienable. Consequently majorities can, if they choose, refuse obedience to the authorities, overthrow them, and change the constitution. In doing so they only exercise an act of sovereignty (*acte de souveraineté*), and before their will the *derived* authority of the representative body itself disappears. Finally, according to Rousseau, there can be no fundamental law for the body of the people: all laws are only manifestations of their will, and cease to have force when their will changes. [This analysis of Rousseau appears to be based chiefly on *Contr. Soc.* i. 7; ii. 1; iii. 10, 15–18.] (Cp. on Rousseau's theory Gierke, *Joh. Althusius*, p. 201 ff.) [On the Jesuit theories of 'the sovereignty of the people' cp. also Janet, *Hist. de la Science politique*, Liv. iii. ch. 4.]

terrible weapon of destruction. The National Assembly, in their declaration of war (April 20, 1792), officially proclaimed Rousseau's theory: 'Without doubt the French nation has distinctly proclaimed that sovereignty belongs only to the people, who, limited in the exercise of their supreme will by the rights of posterity, cannot delegate a power which is irrevocable; it has recognised that no custom, no convention can submit a society of men to an authority which they have not the right to resume. Every nation has alone the power of making its laws, and the inalienable right of changing them. This right belongs to none, or it belongs to all[a].' After the destruction of the monarchy, the Convention revealed the further consequences of this principle.

But even in our own days we have heard this same principle proclaimed again at the Hôtel de Ville of Paris. By a similar sovereign act of the revolted Parisians in Feb. 1848, constitutional monarchy was abolished, a Republic proclaimed, and the dictatorship given to a provisional government. An official proclamation of Lamartine's contains these words: 'Every Frenchman who has attained the age of manhood is a citizen, every citizen is an elector, *every elector is sovereign.* The right is equal and absolute for all. No citizen can say to another, "I am more sovereign than thou." Consider your power, prepare to exercise it, and be worthy of entering on the possession of your sovereignty[2].'

4. The Sovereignty of Reason or Justice?

Some French statesmen, with good intentions but without much success, have attempted to oppose to this destructive conception of sovereignty of the people the idea of a sovereignty of 'reason' or of 'justice'[3]. They attempt in this

[a] [Thiers, *Rév. Fr.* ii. note 10. This ref. is given by the Fr. transl.

[2] Lamartine, *Histoire de la révolution de* 1848, ii. p. 449.

[3] E. g. Royer-Collard, in his speech of May 27, 1820: 'There are two elements in society, the one *material*, i. e. the individual with his force and will'—but are these material? and is not this the old error of deriving Public Law from the individual will?—'the other *moral*, i. e. Law, which results from legitimate interests. Do you choose to derive society from the *material* element? The majority of individuals, the majority of wills, is then the sovereign. This is the sovereignty of the people. If this blind and violent sovereignty, voluntarily or involun-

way to restrain the bad uses which the people might make of its sovereignty. But they forget that right can only belong to a *person*, and that political supremacy can only be ascribed to a political personality, and must be exercised by them in accordance with the principles of reason and justice. The error which recognises the only fundamental form of State in absolute democracy is here opposed by the error of ideocracy. The intention is to guide the majority by the rule of ideas, but personality is always stronger than fiction.

5. Of the People as a unity

According to another opinion, the sovereign is the people (German, *Nation*), thought of as a unity, but not yet sufficiently organised, though capable of organisation: the people, with their language, feelings, social distinctions, is supposed to have the right of changing the State as they will.

We have already recognised (Bk. II. ch. ii.) in the people (*Nation*) the material for a nation (*Volk*), and we must therefore admit that it is the natural condition of the formation of sovereignty, but it is only the possibility, and not the realisation. The sovereignty of the people in this sense (*Volkssouveränität*, or, according to the more proper German use, *Nationalsouveränität*) is something undeveloped, immature and antecedent to the State.

6. Sovereignty of the Nation or the State.

We can and we must understand the nation or people (*Volk*) in a political sense as the organised totality with head and members, the living personality of the State.

So far as the State appears as a person, so far it has independence, honour, power, supreme authority, unity; in one word, sovereignty. The State as a person is sovereign, and therefore we speak of sovereignty of the State (*Statssouveränität*). This is not something before, nor outside, nor above

tarily, transfers itself to the hands of one or of more without changing its character, it becomes a wiser or more moderate force, but it still remains force. This is the source of absolute power and of privilege. Do you prefer, on the other hand, to derive society from the *moral* element, i. e. from Right (*le droit*)? *Justice* is then sovereign, because justice is the rule of right. The purpose of free constitutions is to dethrone force and to make justice reign.' [Aristotle speaks of the 'sovereignty of law' (τοὺς νόμους εἶναι κυρίους κειμένους ὀρθῶς, *Pol.* iii. 11. § 19. 1282 b, 2).]

the State; it is the power and majesty of the State itself. It is the right of the whole, and as certainly as the whole is stronger than any of its parts, so certainly the sovereignty of the whole State is superior to the sovereignty of any member of the State.

If party disputes had not introduced confusion, this sovereignty of the State might conveniently be called sovereignty of the people, if we understand by 'people' not a mere multitude of separate individuals, but the politically organised whole, in which the head occupies the highest position, and every member has its suitable place. In this sense French publicists have spoken of *la souveraineté de la nation*[a], in accordance with the usage of the French language, which, as we have explained, is the opposite of the German (Bk. II. ch. ii). To avoid misunderstandings, however, we have preferred the unambiguous expression, 'Sovereignty of the State.'

This sovereignty of the State may be looked at from without and from within: from without, as the independence of a particular State in relation to others, so far also in relation to the Church: from within, as the legislative power of the body politic.

In this sense sovereignty is ascribed in England to the Parliament, at whose head stands the King[b], and which re-

[a] Stüve, *Sendschreiben* of 1848: 'No one will deny the sovereignty of the people, i. e. the nation, if by nation is understood the whole nation in its *constitutional form*, including both prince and people. If a part of the whole claims sovereignty, and says "I am the State," it matters little whether that part is king, parliament or multitude; the principle is false, and a false principle has always dangerous consequences.' Sismondi (*Études*, i. p. 88) makes an equally sharp distinction between 'souveraineté du peuple,' which he rejects, and 'souveraineté de la nation,' which he admits.

[b] [In treating the king as a part of parliament Bluntschli has the support of English constitutional lawyers. Cp. Blackstone, *Commentaries*, Book II, ch. ii.: 'The constituent parts of a parliament are ... the king's majesty, sitting there in his royal political capacity, and the three estates of the realm; the lords spiritual, the lords temporal, who sit together with the king in one house, and the commons, who sit by themselves in another;' Dicey, *Law of the Constitution*, 3rd ed. p. 37: 'Parliament means in the mouth of a lawyer (though the word has

presents the whole nation [5]. This is not a peculiarity of the English constitution, but a fundamental principle of modern representative institutions. The prince is regarded as the head, but, on that very account, as also a member of the nation; but the highest sovereign power, that of legislation, is entrusted not to the head alone, but to the head along with the representative body, that is to say, to the whole body of the State. The patrimonial view, which regards the State as a property of the prince, and therefore ascribes sovereignty to the prince alone, and the absolutist doctrine, which identifies the State with the prince, both fail to recognise that all the power of the prince is essentially only the concentrated power of the nation, and that, though princes and dynasties fall, the nation and the State retain their legal existence (*als Rechtswesen bleibt*) [6].

often a different sense in ordinary conversation), the King, the House of Lords, and the House of Commons.' But, historically, as well as 'in ordinary conversation,' parliament is distinct from the king, and means the assembly of estates without whose counsel and consent the king cannot enact a law. It is an old and frequently corrected error that the king, the lords and the commons constitute 'the three estates of the realm.' The three estates of the realm are the clergy, the lords and the commons, and so far as there are three estates in parliament, they are (as Blackstone says) the lords spiritual, the lords temporal, and the commons. The clergy, as a whole, were invited to be an estate of parliament in the 13th century, but refused to assume the position. (Cp. Anson, *Law and Custom of the Constitution*, Part I, ch. iv. § 2. p. 45, where parliament is defined as 'an assemblage of the three estates of the realm, which one of the estates persistently declines to attend.') An assembly of the estates is not a parliament, unless summoned by the king: without such a summons it is only a 'convention.']

[5] This idea is expressed in a speech of King Henry VIII of England in Parliament: 'Likewise the judges have informed us that we at no time stand so high in our estate royal as in the time of Parliament, when we as head and you as members are conjoined and knit together into one body politic; so that whatsoever is done or offered against the meanest member of the House is judged as done against our own person and the whole court of Parliament.' (Quoted by Lord John Russell, *The English Government and Constitution*, chap. iii. p. 10, edit. 1865.)

[6] Zöpfl (*Grundsätze des gemeinen deutschen Statsrechts*, §§ 54–56) rejects this 'sovereignty of the State'—and that not merely as applied to the German States—maintaining that monarchies recognise only the sovereignty of the prince, and republics only the sovereignty of the people. But how, then, are we to explain the Public Law of Rome, which proclaimed the *majestas populi Romani* under the Empire as

Besides the sovereignty of the entire nation, there is another within the State, the sovereignty of the highest member, the chief, the rulers, or, since it is most clearly seen in monarchy, the sovereignty of the prince. The head of the nation has the highest power and position compared with all the other members of the political organism, and with the individual citizens. Thus in English Public Law the king is called 'sovereign' in a particular sense, and thus in every monarchical State sovereignty is ascribed to the monarch. 7. Sovereignty of the Ruler.

The sovereignty of the State and the sovereignty of the prince are not in contradiction. There does not result a division of sovereignty, as if the one half belonged to the people and the other to the prince: there are not two jealous powers striving for supremacy. Both imply unity and plenitude of power; but it is clear that the whole, including the head, is superior to the head alone. The whole nation or State makes the law, but within legal limits the head moves with complete freedom in the exercise of the supreme power assigned to him. The sovereignty of the

well as under the Republic, and always regarded *lex* as *voluntas populi Romani*; while, on the other hand, under the Republic, a *regium imperium* was ascribed to the Consuls, and the Senate possessed the supreme administrative power and the right of taxation (which is certainly an attribute of governmental sovereignty)? How, too, are we to explain the English Public Law, which harmonises the sovereignty of Parliament and of the nation with the sovereignty of the king? As a matter of International Law, even the German States—apart from their princes—count as sovereign persons; but if they are persons in relation to other States, must they not also be persons in relation to their own individual members and to their princes? The laws in Germany are the laws of the State: and the national or state-debts are distinguished from the debts of the princes, that is to say, in spite of all survivals of the patrimonial or absolute power of the prince, the Public Law of Germany recognises, along with that of almost all civilised countries, that the nation is something other and higher than the sum total of subjects, and that the State has an existence, a majesty and a power which is not exhausted by the majesty and power of the princes. I concede to Zöpfl, that the exclusive admission of the sovereignty of the prince does not logically imply that his sovereignty is unlimited; but recent history has incontestably shown that this exclusive principle has, in Germany as well as in the Latin countries, been a dangerous support of absolutism and contempt of national rights.

State is especially that of the law; of the prince, that of the government or administration. The latter operates where the former is inoperative. A conflict between them is rare in fact and impossible in principle; for it would imply a conflict of the head alone with the head in combination with the rest of the State, and thus a conflict of the same person with himself[c].

There can be no true peace between the democratic sovereignty of the people and the sovereignty of the prince; but between the sovereignty of the State and the sovereignty of the prince there is the same harmony as between the whole man and his head.

[c] [A similar question was involved in the trial of Strafford. By the Statute of Edward III treason was defined as certain offences against the 'King.' Strafford had undoubtedly acted with the approval of the King, and the lawyers were compelled to develope the theory that the 'King' was an expression for the 'State,' and that offences against the latter were consequently treason.]

Note.—The phrase 'sovereignty of the people' is sometimes used to express, not the supremacy of the majority, but only the idea that a form of State or a manner of government, which is incompatible with the existence and welfare of the majority of the people, cannot be maintained, or, that the form of the State and the government are there *for* the people—an idea which is true, but badly expressed.

Again, if by 'sovereignty of the people' it is meant that the authority of the State is *derived originally* from the will of the majority, we must indeed admit that many democratic constitutions, and even some monarchical (e. g. the Roman Empire, the French Empire), are based, in theory or principle at least, on the voluntary act of the majority of the people. In the same way the constitutions of several Swiss Cantons declare, not that the people (*Volk*) is sovereign, but that 'the sovereignty resides in the people as a whole (*auf der Gesammtheit des Volks beruhe*), and is exercised by the Great Council,' (e. g. the Zürich Constitution of 1831, § 1). But even this principle would not be applicable to all States, and the term 'sovereignty,' which expresses a permanent right, is inappropriate when applied to particular and transitory acts.

Finally, if the phrase 'sovereignty of the people' be understood, as has often happened in practice, to imply that the people, as distinct from the government, or even any powerful and excited multitude, is justified in arbitrarily overthrowing the government or destroying the

constitution, this is an idea which is altogether to be condemned, and which is irreconcileable even with democratic principles.

[In England, the question of sovereignty has in recent times been chiefly discussed in connection with the famous definition of Austin, *Jurisprudence*, Lect. vi: 'If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is Sovereign in that society, and the society, including the superior, is a society political and independent.' This abstract analysis of the conception of sovereignty, which is quite unhistorical and difficult to apply in practice, is criticised by Maine, *Early Hist. of Institutions*, Lect. xii, xiii. See also F. Harrison on *The English School of Jurisprudence*, in *Fortnightly Review*, vol. 30 (1878): Clark's *Practical Jurisprudence, a Comment on Austin*, Part i. ch. xiv: Holland's *Jurisprudence*, ch. iv: T. H. Green, *Works*, vol. ii. pp. 399 ff.]

CHAPTER III.

I. Analysis of the Sovereignty of the State.

1. Majesty.

The organised nation has a right to have its dignity and greatness, or, as the Romans called it, its majesty[1], recognised and respected. At Rome, every serious injury to the honour, power, even to the order of the State, was considered as a *crimen laesae majestatis.*

2. Independence.

The independence of the State from foreign States. If a State is compelled to recognise the political superiority of another, it loses its sovereignty, and becomes subjected to the sovereignty of the latter[2].

Not every subjection of a State destroys its sovereignty completely, since the dependence may not be absolute. In composite States, Confederations (*Statenbünde*), Federal States (*Bundesstaten*), and Federal Empires (*Bundesreiche*), the particular States, although in certain respects subordinated to the whole, have yet a *relative* sovereignty limited in extent but not in content. Thus in Switzerland, cantonal sovereignty is distinguished from federal sovereignty; similarly, in North America and in the German Empire, there is a difference between the sovereignty of the Union or Empire, and that of the federated States.

[1] Cicero, *de Oratore*, ii. 39: 'Si majestas est amplitudo ac dignitas civitatis, is eam minuit, qui exercitum hostibus populi Romani tradidit.' *Partit. orat.*, c. 30: 'Minuit is, qui per vim multitudinis rem ad seditionem vocavit.' *Auctor ad Herennium*, ii. 12: 'Minuit qui ea tollit ex quibus civitatis amplitudo constat,—qui amplitudinem civitatis detrimento adficit.' Comp. Heineccius, *Antiquit. rom.* iv. xviii. 3, 46.

[2] In treaties of peace with conquered states, the Romans used the formula 'Majestatem populi Romani comiter conservato,' or 'imperium majestatemque populi Romani conservato sine dolo malo' (Cic. *pro Balbo*, c. 16; Liv. xxxviii. 11).

We can only speak of a relative sovereignty in the particular State so long as this has a political organisation of its own, that is to say, has all essential organs, legislative, administrative, &c., in itself, and has not been reduced into a mere province of the greater whole. The point of transition is sometimes difficult to mark precisely.

Externally, the sovereignty of the State is now-a-days commonly represented by the chief or head, not by the legislative body; but this is more on grounds of convenience than of principle.

3. Power of choosing and altering the form of government.

Internally, sovereignty is manifested, in the first place, in the right of the people to determine as they choose the forms of their political existence, and if necessary to alter them. This is called the *constituent* power of the nation[3]. This right cannot be conceded to a part of the people, to the mere majority, but it undoubtedly belongs to the organised nation as a whole. The individual subject may not resist the commands of the nation, even if his political rights are thereby injured; for unless the individual submitted in matters of Public Law, the State could not maintain its unity, coherence, and order.

Reform.

Yet it is not a matter of indifference, either from the moral or the constitutional point of view, whether the alteration takes place in the way of reform or of revolution. Reform implies (1) that the change is introduced in accordance with the constitution, e. g. by a representative body: the change must be constitutional in form. (2) The change must conform to the spirit of the constitution: ancient in-

[3] Washington's *Farewell Address* of 1796: 'The basis of our political systems is the right of the people to make and alter their Constitutions of Government. But the Constitution which at any time exists, till changed by an explicit and authentic act of the whole People, is sacredly obligatory upon all. The very idea of the power and right of the People to establish Government, presupposes the duty of every individual to obey the established Government. All obstructions to the execution of the Laws, all combinations and associations under whatever plausible character, with the real design to direct, control, counteract or awe the regular deliberation and action of the constituted authorities, are destructive of this fundamental principle, and of fatal tendency.' [The speeches are given in vol. ii. of Sparks' *Life of Washington*.]

stitutions, if they are put aside, must be really antiquated, and new institutions must have the way prepared for them in new conditions.

Revolution.

If either the form or the spirit of the constitution is violated, a change is no longer reform but revolution.

The right of reform is a necessary expression of the vitality of a State. If this right is resisted, the development of the nation is denied, and occasion is given for revolution.

Is there a 'right of revolution'?

There is a radical doctrine of 'the right of revolution,' but this is opposed to the very conception of Public Law. Revolution is either a forcible breach of the established constitution or a violation of its principles. Thus, as a rule, revolutions are not matters of right, although they are mighty natural phenomena, which alter Public Law. Where the powers which are passionately stirred in the people are unchained, and produce a revolutionary eruption, the regular operation of constitutional law is disturbed. In the presence of revolution law is impotent. It is indeed a great task of practical politics to bring back revolutionary movements as soon as possible into the regular channels of constitutional reform.

There can be no right of revolution, unless exceptionally: it can only be justified by that necessity which compels a nation to save its existence or to secure its growth where the ways of reform are closed. The constitution is only the external organisation of the people, and if by means of it the State itself is in danger of perishing, or if vital interests of the public weal are threatened, 'necessity knows no law'.[1]

[1] Niebuhr, who was so strong a conservative that the French Revolution of July, 1830, broke his heart, expresses himself as follows (*Gesch. des Zeitalters der Revol.* i. p. 211): 'To deny the maxim "necessity knows no law" is to authorise the worst atrocities. When a nation is trodden under foot and cruelly illtreated without hope of amelioration, like Greece under Turkey, a tyrant without respect for the rights of men or the honour of women, then it is a case of extreme necessity, and no act can be more rightful than revolt against the oppressors. He who denies this must be a miserable wretch.'

The legislative power is the normal manifestation of the sovereignty of the State. 4. Legislation.

All public powers depend in principle upon it: thus the constitution and legislation limit and arrange all other expressions of sovereignty. In constitution-making and legislation the sovereignty of the State is in active exercise: otherwise, as a rule, it is in repose. In monarchy especially the daily and changing activity of the other powers is concentrated in the sovereignty of the monarch. The nation, as a whole, remains at rest, while its head acts either directly or indirectly by means of magistrates and officials. 5. Dependence on it of all other powers in the State.

If, however, the organ which has to care for this regular activity becomes incapable of exercising it; if, for instance, there is a vacancy on the throne, and no successor is designated by the constitution, the sovereignty of the State becomes itself operative in order to supply the defect.

From a higher point of view man is never irresponsible. Nations themselves are not only responsible to the eternal judgment of God, but to the facts of History[8]. Yet it is impossible to establish within the State a tribunal before which the nation itself, as a whole, or its representative as entrusted with supreme power, can be brought to account; for in that case the State itself would be subject to this tribunal, and thus the whole to the part, the body to the particular member. 6. Irresponsibility.

If a State were responsible for the exercise of its sovereignty to another State, its sovereignty would thereby be limited.

The development of International Law, or the institution of a universal State, might organise the legal (*rechtlich*) responsibility of nations. At present this is only an ideal, which the future may perhaps realise.

[8] Robespierre declared the contrary in the Jacobin Club (Feb. 1793): 'J'ai soutenu au milieu des persécutions et sans appui, que le peuple n'a jamais tort; j'ai osé affirmer cette vérité dans un temps où elle n'était point encore reconnue; le cours de la révolution l'a développée.' France has had to pay a heavy penalty for the consequences of his errors, and history has severely condemned them.

7. Responsibility to it of all other powers in the State.

All particular powers are responsible to the organs of the sovereignty of the State. Ministers and the highest officials must give account of their administration.

Note.—Constituent Assemblies in recent times have usually followed the precedent of the French National Assembly of 1789 in accepting as the principle of their action, not the sovereignty of the State, but the sovereignty of 'the people,' in the sense of Rousseau. But Rousseau himself goes much farther. He denies complete sovereignty to any representative assembly, and considers the mass of the people justified at any moment in arbitrarily and directly imposing their will upon it [*Contr. Soc.* iii. 15]. The consequences of this doctrine have often appeared on the political horizon like threatening comets, terrifying even those 'sovereign' bodies which had set on fire the chaotic masses round about them.

CHAPTER IV.

II. Sovereignty of the Prince.

The sovereignty of the chief of the State is in modern times only recognised in monarchy. The president of a republic, although he certainly exercises sovereign rights, has no personal claim to be considered sovereign.

The Sovereignty of the chief of the State not recognised in modern Republics.

In the old Roman Republic 'majesty' was ascribed to the consuls, who had divided among them the kingly power, and afterwards to the senate also. Modern republics are more jealous of sovereignty, and consider the chiefs of the government as mere mandatories of the people, whose sovereign rights cannot be transferred to them [1].

It is sometimes held that the sovereignty of the prince is to be found only in hereditary and not in elective monarchies; but this is to confuse the essence of princely power with the question of its origin. An elected prince possesses sovereignty in his own right, not less than a hereditary. Thus the old Roman emperors and the Roman-German emperors of the middle ages were undoubtedly sovereigns. The English king, George I [a], was so, not less than his successors, although with him begun a new dynasty.

but in all monarchies, elective as well as hereditary.

[1] Rousseau (*Contr. Soc.* ii. 2) rejects the sovereignty of the prince on the ground that the 'general will' (*la volonté générale*) can only belong to the whole people. A section of the people can only have a *particular* will, and consequently can at the most make decrees. Only the whole people can make laws. But it is an error to see sovereignty only in legislation and not also in government.

[a] [Bluntschli says 'William of Orange'—a better instance of an elected king; but he founded no dynasty.]

It may be either

On the other hand, we can scientifically distinguish an *original* from a *derived* sovereignty of the prince, a distinction that has no application to the sovereignty of the State, which

(1) Original, is always original. The first is that which is originally inherent in a prince, in virtue of rights to which he is born, or which he has seized. To this class belong the sovereignty of hereditary princes, that of a conqueror, and that of a prince who sets the crown on his own head, like Charles the Great, or Frederick I of Prussia; and likewise that of the elective German emperors, who derived their sovereignty, not from the electors, but from God.

or (2) Derived.

The second is held to be transferred or derived from the people or the electors. Thus the imperial power was given by the Roman people [2]. Modern elective monarchies are of the same sort.

We shall analyse the sovereignty of the prince after we have considered the different functions of that of the State.

[2] Cp. above, Bk. vi. chap. x. p. 371.

CHAPTER V.

THE DIVISION OF POWERS.

I. The Primary Assemblies of Antiquity.

The modern State has attained a far higher degree of perfection than the ancient in the development of the legislative body. Even in ancient times the fundamental idea had been grasped that the whole nation participates in legislation, and that the people is represented in the legislative body; but the citizens themselves were assembled together, and thus exercised this function *directly*.

Direct legislative assemblies:

The Greek popular assemblies were of a comparatively primitive kind. A confused crowd of citizens came together in the Pnyx, or in the theatre, at Athens: they were counted by heads, and every one had the right of speaking. The Roman Comitia, on the other hand, were organically divided into classes, and acted only under the leadership of the higher magistrates [1].

This system has essential faults which have been remedied by the modern method of representation:—

inferior to representative.

(1) A direct assemblage of the whole citizens is impossible in every State whose territory is larger than that of a parish or a township. The assembly of the people in larger States becomes a sham, as happened at Rome in the last centuries

[1] For this reason the Romans regarded the *comitia centuriata* as higher than the *comitia tributa*. Cic. *de Leg.* iii. 19: 'Descriptus populus censu, ordinibus, aetatibus plus adhibet ad suffragium consilii, quam fuse in tribus convocatus.'

of the Republic. The populace, or the mob of the capital, obtains a disproportionate influence.

(2) An assembly so large and so mixed is a very helpless body, able at the most to announce the general opinion, to express its approval or its disapproval of a proposition already known, but altogether incapable of deliberating seriously on a projected law, or of solving the more complicated problems of politics.

Only in quite small States, and in very simple conditions, can legislation be entrusted to a popular assembly.

CHAPTER VI.

II. Ancient Distinction of Political Functions.

The essential unity of sovereignty does not prevent the State having different functions to fulfil.

According to Aristotle (*Pol.* iv. c. 14) these are three :— Aristotle's division.

(1) The deliberative (τὸ βουλευόμενον περὶ τῶν κοινῶν).

(2) The magisterial (τὸ περὶ τὰς ἀρχάς),

(3) The judicial (τὸ δικάζον).

He makes the first concerned with the great political questions of general politics, decisions about war or peace, conclusion of treaties, making of laws, punishment of death, exile and confiscation, and the control of finance. Thus very different sorts of things are brought together—external politics, legislation, supreme criminal jurisdiction and control of administration; but all these are distinguished by their great political significance for the whole State, and for the security of the citizens. Aristotle calls all this deliberation, not legislation, perhaps because legislation proper was not exercised by the popular assemblies till later, and only indirectly, whilst their deliberations had a great influence in the most important matters [a].

The second class of functions corresponds in some measure to what modern constitutions call *executive* power,

[a] [Νόμοι are, indeed, named as *one* of the subjects with which τὸ βουλευόμενον is concerned (*Pol.* iv. 14. § 3, 1298 a. 5). But it is clear that Aristotle, like the Greeks generally, thinks of a State as starting with a sufficient code of laws, framed for it by a νομοθέτης, and requiring as little alteration as possible (e. g. *Pol.* ii. 8. §§ 16–25, 1268 b. 22 seq., 11. § 15, 1273 b. 21: iii. 13. § 23, 1284 b. 17), the individual ruler or assembly being concerned only with particular details, to which the law cannot apply because it is general (καθόλου) in its character (*N. Eth.* v. 10: *Pol.* iii. 15. §§ 3 seq., 1286 a. 8). Cp. *N. Eth.* vi. 8, where νομοθετική is distinguished from βουλευτική.]

but it is more correctly described by reference to the ruling offices.

The third class corresponds to our judicial power.

Different functions often exercised by the same persons in Greece and Rome.

Although the different functions are objectively distinguished [i.e. in respect of their character], they are often subjectively combined [i.e. in respect of the persons who exercise them]. We have already remarked that the Athenian ecclesia deliberated about laws, executed important matters of administration, and exercised judicial functions. The archons were administrative officials, and yet they had judicial powers. The Roman State was more developed and differentiated. The legislative functions of the comitia were more sharply distinguished from the functions of the senate and the magistrates. Yet the comitia treated of important questions of foreign policy, and in early times decided on appeals against sentence of death. The senate did not only exercise administrative functions; its resolutions came to have the character of laws. Finally, the magistrates as a rule combined administrative and judicial functions. He who possessed the *imperium* possessed in the same measure *jurisdictio*[1]: he had, besides, priestly functions (the auspices), and by his edicts he exercised a sort of legislative power. Nevertheless, there is observable in the institutions of the Republic a conscious effort to differentiate the functions of government.

Distinction between Civil and Military offices in the Byzantine Empire.

A new distinction arose in the Eastern Roman Empire. The emperors, indeed, retained in their hands all public powers over the whole empire, but in the subordinate grades of provincial government civil and military offices were carefully distinguished[b]. This separation which had not been effected earlier in the interest of the subjects, who

[1] Cicero, *de Leg.* iii. 3: 'Omnes magistratus auspicium *judiciumque* habento.' Ulpianus in L. 2. D, de in jus voc.: 'Magistratus, qui *imperium* habent, qui *coercere* aliquem possunt, et jubere in carcerem duci.' Ulpianus, L. 1. pr. D, si quis jus dicenti: 'Omnibus magistratibus . . . secundum jus potestatis suae concessum est, *jurisdictionem* suam defendere poenali judicio.'

[b] [Cp. Gibbon's *Decline and Fall*, ch. xvii.]

were oppressed by the excessive power of the magistrates, was now carried out in order to secure the throne. This involved, however, a step in political progress which has been accepted in the modern State.

In the Middle Ages little differentiation.

In the middle ages the power of the State was on all sides checked and limited, but internally it united in itself the most various functions; not only the king but every count had at the same time civil and military, administrative and judicial power, and the assemblies (*Dinge*) were at the same time legislative and judicial.

Bodin urges the separation of the judicial functions.

Bodin was the first to point out that the prince at least ought not to administer justice in person, but should leave such matters to independent judges. Bodin shows that there are many reasons in favour of the old usage: thus it made a good impression that the king should exercise justice in the sight of all people, but he sees that there are stronger reasons for the monarch withholding himself from personally exercising the office of judge. To be at once legislator and judge is to mingle together justice and the prerogative of mercy, adherence to the law, and arbitrary departure from it: if justice is not well administered, the litigating parties are not free enough, they are crushed by the authority of the sovereign. The horrors of punishment are frightfully increased, and if the prince has a cruel disposition, the judgment-seat swims in the blood of citizens, and the hatred of the people is roused against their chief. It is worst of all when the prince decides in his own affairs, and with regard to crimes against himself. It is better that he should reserve only the prerogative of mercy[2].

Bodin could indeed point to precedents in French History. Certain parliaments of peers had pronounced against the presence of the king in trials. Most States gradually adopted the new principle. Kings began to leave to tribunals the ordinary administration of justice, and to reserve to themselves only the confirmation of sentences, especially sentences of death.

[2] Bluntschli, *Gesch. des allg. Statsr.* p. 42. Cp. as to Puffendorf, p. 124.

CHAPTER VII.

III. The Modern Principle of Division of Powers.

The idea that the objective difference of political functions requires a corresponding subjective separation in the organs to which these functions belong, has been produced by the course of modern politics.

Montesquieu.

Montesquieu was the first to enounce the modern principle with emphasis and effect. He demands in the name of civic freedom and security that different public functions should be exercised by different persons. 'If legislative and executive powers are united in the same person, or even in the same body of magistrates, there is no liberty, because people are afraid that the monarch or the senate may make tyrannical laws in order to administer them tyrannically. There is no liberty, again, if the judicial power is not separated from the legislative and executive: if it is joined to the legislative power, the life and death of the citizens may be arbitrarily disposed of, for the judge will be legislator: if it is joined to the executive power, the judge may have the force of an oppressor[1].'

The higher organism has the more differentiated functions.

Excessive power united in one hand certainly endangers personal freedom. If the different branches of power are separated, they are all mutually limited. Nevertheless, the decisive reason for such specialisation is not the practical security of civil liberty, but the organic reason that every

[1] *Esprit des Lois*, xi. 6. ['De la constitution d'Angleterre.'] Bluntschli, *Gesch. des allg. Statsr.* p. 267.

function will be better fulfilled if its organ is specially directed to this particular end, than if quite different functions are assigned to the same organ. The statesman only follows the example of nature: the eye is adapted for sight, the ear for hearing, the mouth for speaking, the hand for seizing. The body politic should in the same way have a separate organ for each function.

Distinction, not separation.

The favourite expression 'separation (*Trennung*) of powers' leads to false applications of a true principle. A complete separation or sundering of powers would be a dissolution of the unity of the State. Just as in the body natural all the several limbs are connected together, so in the body politic the connection of the organs is not less important than their difference. In the State there must be a unity of power, and so the powers, though distinguished according to their functions, must not be absolutely separated.

The three-fold division.

Montesquieu makes the three-fold distinction—(1) *pouvoir législatif*, (2) *exécutif*, (3) *judiciaire*.

The same division is adopted by English political theorists. This threefold division has been carried out with rigour, but not without exaggeration, in the United States of North America [a], and has been sanctioned by a whole series of modern European constitutions.

Additions to it.

To these three powers some have added, primarily in the interests of the unity of the State:—

(4) A moderating power (*pouvoir modérateur, royal*). This idea of Benjamin Constant's has been adopted in the Portuguese constitution of Don Pedro.

Others have added to the executive power:—

(5) The administrative (*pouvoir administratif*).

(6) The inspective (*potestas inspectiva*).

(7) The representative (*pouvoir représentatif*).

There is a mistaken view that these different powers are

[a] [For the way in which the actual constitution of the United States followed the then current *theory* of the English Constitution, cp. Bagehot's *English Constitution*, pp. 27, 227 (edit. 1872).]

These different powers not equal.

equal. This contradicts the organic nature of the State. The members of an organism have each their own power, but in subordination to one another; otherwise the connection and the unity of the whole would not be maintained. And so in the State: if the highest powers were really equal, and not merely in outward form, as in the United States of North America, the State would be torn in pieces. 'The head cannot be separated from the body and made equal to it, without killing the man.' (Bluntschli, *Studien*, p. 146.)

Not the propositions of a syllogism.

Another error, which is almost childish, is that which treats the organism of the State as a logical syllogism: the legislative power determining the rule or major premise, the judicial power subsuming a particular case under it (minor premise), while the executive carries out the conclusion [1]. All the functions of the different powers would thus be united in every judicial decision, and government would be only the policeman to execute this judgment.

A. The legislative power.

It is first of all necessary to distinguish the legislative power from all others. All other functions belong to particular organs, but legislation to the whole body politic. The legislative power determines the laws and institutions of the State themselves (*Stats- und Rechtsordnung*). All other powers, on the other hand, are exercised within the existing laws and institutions, in particular, concrete and changing cases. Legislation arranges the permanent relations of the whole; the other powers are, as a rule, exercised only in particular directions, and do not affect the whole nation. These other powers cannot be divided until the rights of the legislative body have been determined.

The legislative power does not only fix general rules of

[1] Montesquieu, xi. 6, puts the matter differently. He calls the judicial power also 'la puissance *exécutrice* des choses qui dépendent du *droit civil*,' and thus distinguishes it objectively from the executive power proper, 'puissance exécutrice des choses, qui dépendent *du droit des gens*.' This strange view has been followed among others by Kant (*Rechtslehre*, § 45), and Spittler (*Vorlesungen über Politik*, § 15). On the other side cp. Stahl, *Lehre vom Stat*, ii. § 57.

Right (*Rechtsregeln*)—laws (*Gesetze*) in the narrower sense. It has also to found and alter the institutions of the State. If it concerns itself with general economic arrangements in the budget (*lois d'impôt*), if it approves not principles but demands, if it takes account of the actual circumstances of the country, it is because these acts, although not laws in the proper sense, relate to the whole of the State.

Views of Rousseau and Stein criticised.

Rousseau explains the relation of legislation to administration by the psychological distinction of will and power. Legislation is the expression of the general will, administration consists in particular actions of the government. 'La loi veut, le roi fait[b].' Lorenz von Stein recognises the same distinction. But an insight into the necessity of laws and institutions is not less important for legislation than the will to establish them: and, on the other hand, the actions of government, which chooses the end and the means of its policy, are as certainly acts of will. Thus it is better to make the distinction one of *general* and *particular* will, of established order and occasional action.

As the whole is more than any of its parts or members, so the legislative power is superior to all the other particular powers.

B. The other powers of the State.

These may be divided, in the modern State, into four groups of essentially different character. The two most important and highest are, I, Government or Administration; II, the Judicial power.

I. Government or Administration (*Regierungsgewalt*). The usual expression, 'Executive (*vollziehende*) power,' is unfortunate, and is the source of a number of errors, misunderstandings in theory, and mistakes in practice. It neither expresses the essential character of government, nor its relation to legislation and the judicial power.

I. Government or Administration.

The term 'Executive' criticised.

A person can execute a decision of his own, or the command or mandate of another. But in any case the execution is only secondary, the decision or mandate is primary.

[b] [See references in footnote 1, Bk. vi. chap. xv. pp. 426, 427 above.]

But the functions of government are in their nature primary: it decides and resolves, it expresses its will, orders or forbids, and in most cases its orders are carried out without executive compulsion. If that is necessary, it is undoubtedly the business of the government; but as it is secondary, it is ordinarily entrusted to subordinate officials, such as the police.

Even if the will of others is in question, the expression 'executive' is inaccurate. It is not true that the government has only to execute in particular cases what the legislature has established in general. As a rule a law is not executed (carried out, but observed and applied. The promulgation of a law is not the same as its execution. The rules which the legislator sanctions, the principles which he expresses, are respected by the government as the legal and constitutional limits of its conduct, but within these limits it decides freely: treats with other States, appoints commissions of enquiry, adopts measures necessary for the maintenance of order, furthers what tends to the public weal, nominates functionaries, controls the army. The expression 'executive' is still less applicable to the administrative government in its relations to the courts of justice. The execution of a judgment is essentially an act of the judicial power itself, whose business it is to administer justice, and to restore rights which have been disturbed, and which does not call in the stronger power of government, except when its own is insufficient. The relation of the two powers is not that of servant to master.

The essence of Government.

The essence of government consists rather in the power of commanding in particular matters what is just and useful, and in the power of protecting the country and the nation from particular attacks and dangers, of representing it, and guarding against common evils. It consists especially in what the Greeks call ἀρχή[3], the Romans *imperium*, the Germans of the middle ages *Mundschaft* and *Vogtei* (*tutelle*

[3] Arist. *Pol.* iv. 15. § 4, 1299 a. 27: τὸ γὰρ ἐπιτάττειν ἀρχικώτατόν ἐστιν. He finds the essence of authority in command.

and *baillage*). Of all other powers government is the ruling, and, without doubt, the highest, being related to the others as the head to the limbs of the body. It includes what is called the *representative power.*

It is called *political government* (*politische Regierung*) in the general conduct of the State, *administration* (*Verwaltung*) in reference to details.

II. The judicial (*richterliche*) power is often regarded as the power which judges (*urtheilen*)—a confusion which is favoured by the French [and English] expressions (*pouvoir judiciaire*). But the essence of judicial power consists not in judging (*urtheilen*), but in laying down the law (*richten*), or, according to the Roman expression, not *in judicio*, but *in jure*. 'Judging,' in the sense of recognising and declaring the justice in particular cases, is not necessarily a function of government, nor the exercise of a public power. In Rome it was commonly entrusted to private persons as *judices*, in mediæval Germany to the assessors (*Schöffen*), not the judges (*Richter*). In modern times it is often entrusted to popular juries. Maintaining the law, on the other hand, and protecting the rights of individuals and of the community, has always been considered as a magisterial function. II. The judicial power.

An essential distinction between judicial power and government is that the former does not, like the latter, exercise rule, but only protects and applies laws already recognised. The functions of government may be compared to the intellectual powers of man, the functions of the judicial powers to his conscience.

The separation (*Ausscheidung*) of the judicial power from that of government in the modern State is a very important political advance. In ancient times and in the middle ages the same magistrates exercised both functions. The purity of justice, the liberty of the citizens, have gained by the change, and government has not lost in security [4]. Experience

[4] Compare the words of Washington, in his wonderful Farewell Speech (1796): 'It is important, likewise, that the habits of thinking

proves that distinguished statesmen, and government officials, are very seldom likewise good judges, and *vice versâ*. The judicial power, though independent of the government, is yet subordinate to it, in some such way as the heart is to the head.

Other powers:—

The functions of sovereignty may appear to be exhausted by this three-fold distinction, and we can easily understand how recent constitutions have commonly limited themselves to these. But on closer examination, we find that there are two other groups of organs and functions, both of which are indeed subordinate to that of government, but may still be distinguished from it, having much less the character of authority and command, which in government is essential. These are:—

III. and IV. Superintendence of intellectual and material interests.

III. The superintendence and care of the intellectual elements of civilisation (*Statscultur*).

IV. The administration and care of material interests (*Statswirthschaft*) [Political Economy in the original sense].

In these two groups there is no question of governing. The great factors of civilisation, religion, science, art, do not belong to the organism of the State. Thus the relation of the State, even to the external institutions of religion, science and art, to the Church and the school, is fundamentally different from the relation between government and subjects in its own proper sphere. Such matters cannot be subjected to the dominion of the State: its functions are therefore

in a free country should inspire caution in those entrusted with its administration to confine themselves within their respective constitutional spheres; avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal against invasions by the others, has been evinced by experiments ancient and modern, some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them.'

limited to superintendence and fostering care (*Aufsicht und Pflege*).

The same applies to the fourth head, Public Economy. In the administration of the income and expenditure of the State, in the maintenance of the economic welfare of the citizens, in the support of commerce, in the management of public works, in the control of local government, there is no exercise of *imperium* in the strict sense. Economic administration must be based, not so much on the authority of the State, as on technical knowledge and experience. In no other matters does the action of the State approach so nearly to that of the private person. The property of the State may be bought and sold like that of a private person. The material welfare of the community is the broad basis on which the State rests, and thus, although it is a necessary condition of political existence, occupies the lowest place, while government occupies the highest.

This distinction in the functions of the State has only in recent times come to be gradually recognised. We still suffer from the evils of a confusion of commanding and fostering. Sometimes things are commanded or forbidden, which should only be managed or controlled; sometimes there is a timid assistance or control, where there ought to be energetic and authoritative action. But matters are better than they were a hundred, or even fifty, years ago. Many institutions have been already separated from the direct administration of government, and are managed, without the employment of force, in a spirit of scientific and technical care, and in the interests at once of the welfare and the freedom of the community.

CHAPTER VIII.

PUBLIC SERVICE AND PUBLIC FUNCTIONS[1a].

Public Service in a wider and a narrower sense.

1. In a wide sense every service exacted by the State, or rendered voluntarily to the State, can be called 'public service.' This would include the service of soldiers, juries, deputies, and electors, whether secondary or primary. Not all these services, however, are public services in the proper sense, which implies a special charge or commission given by the State. The functionaries of parishes, of the church, and of other corporations, are not servants of the State; their service is public, but it is not laid upon them by the State, and is not immediately related to the State[1].

The head of the State is not a public servant, in so far as he is himself sovereign, and the source of all public services: yet Frederick the Great was right in calling the king 'the first servant of the State,' because even his office is dependent upon the constitution, and exists altogether for the service of the State.

Not all public servants are State officials.

2. Not all public services in the narrower sense are public functions; not all public servants are State officials. A State office is a particular organ in the body politic, with special functions of its own.

A public function is limited to particular objects. The

[1a] Cp. with this chapter esp. Schulze, *Lehrbuch des deutschen Statsrechts*, i. 309 ff.: Laband, *Statsrecht des deutschen Reichs*, i. 382 ff.: Löning, *Lehrbuch des Verwaltungsrechts*, 115 ff.

[1] Particular public functions may be entrusted to them, but their proper character is not thereby altered. Cp. Welcker's *Statslexicon*, *s. v.* Statsdiener.

office is filled by the person of the official. State officials or functionaries, in a wider sense, are those public servants who, although recognising and respecting their subordination to the head of the State, yet exercise their offices according to their own judgment; in a narrower sense they are those only who have entrusted to them a power of command (*imperium* or *jurisdictio*), as distinct from those who have no authority of this sort. These last we might describe by the good old term of public curators (*öffentliche Pfleger*). Such are professors and teachers in State schools, directors and physicians in public hospitals, government engineers, and many financial officials, such as treasurers and administrators of crown lands[2].

Difference between administrative and judicial functionaries.

State functionaries proper are those employed either in administrative or judicial matters. The former exercise the *imperium*; within their sphere they order at their own discretion what they consider for the public interest, but they depend upon their superiors, and must submit to their injunctions. Judicial functionaries, on the other hand, cannot exercise their own discretion as to what public interest demands: they must lay down the law as it exists, and apply it according to fixed rules (*jurisdictio*); but in doing so they must act according to their own conscience, and are not bound by any special injunctions of the government. In ordinary circumstances the former class of functionaries may be expected to display a liberal, the latter a conservative tendency.

Official assistants.

3. From both kinds of State functionaries we must distinguish the employés of the State, and official assistants. These are certainly public servants, but they have no special office, no authority or independent sphere: they are merely assistants of the officials under whom they are placed. Such are clerks, inspectors, revenue collectors, etc. They are

[2] Schmitthenner, *Statsrecht*, p. 503. He uses the expression '*technical* officials' (in opposition to 'government officials'), and includes the judges among them. The name would apply better to our second class above.

public servants, because their activity is employed as an organic part of the life of the State, and in so far as their work is of an intellectual, though not of the highest kind. If even this last element is wanting, and merely mechanical service is the chief thing[3], they are no longer to be called public servants, although they are used by the State. One might call them 'private servants, or domestics of the State' (*Statsbediente*): such are lacqueys, porters, beadles, policemen, sergeants-at-arms, etc. Their condition is regulated by private law, rather than by the essential conditions of public service.

Distinction between civil and military offices:

4. The distinction between civil and military functions, which was first clearly made by the Emperor Constantine the Great[4], is of significance in the modern State. The officers of the army alone can be considered public servants, as they alone have the command: the other soldiers are only fulfilling a general civic duty, or have voluntarily enlisted under the form of private contract. Military officers are chiefly distinguished from civil by the stricter discipline and the military obedience, but partly also by the fact that they possess authority only indirectly, because their functions are executive, and therefore secondary by nature.

Distinction between collegiate and individual offices.

5. A distinction is made between collegiate and individual offices[5]. The former, composed of several persons who deliberate together and of whom the majority decides, are better adapted for advice, the latter for action. Sometimes collegiate deliberation and individual decision may be united: thus a minister decides after having taken the advice of his colleagues.

Distinction

Further, offices are distinguished as higher and lower, and

[3] Schmitthenner, *Statsrecht*, p. 503, rightly calls attention to this distinction. But in calling the employés of the State '*subaltern*' functionaries, he uses an unsuitable term, because it only expresses subordination, which is equally to be found among the real officials. 'State-officials' (*Statsbeamte*) and 'official assistants' (*Amtsgehülfen*) would express the distinction better.

[4] Cp. above, Bk. vii. chap. vi. p. 516. Gibbon's *Decline and Fall*, chap. xvii.

[5] Cp. Pözl, *Deutsches Statswörterbuch*, art. 'Amt.'

according to the locality of their operation. There are central offices (*Landesämter*), intermediate offices relating to provinces, departments, districts, etc.; and, lowest of all, local or parochial (communal) offices. Sometimes, too, there are concurrent offices, where several functionaries exercise the same powers in the same district, but each by himself, e. g. the magistracies of ancient Rome, the English Justices of the Peace. according to locality.

6. Office generally implies: What office implies:

(*a*) A certain kind and extent of public powers and duties. This is called its competency.

(*b*) A local seat as the proper centre and residence of its action. Even officials who move about have a fixed official place.

(*c*) A territorial sphere of operation.

7. The relations between the State and its servants are not a matter of private law, but essentially political in character. The service of the State is not a commission or mandate, still less merely hired service. The rules of private contract do not explain either the appointment, or the powers, or the dismissal of a public servant. Relation between the State and its servants.

The State nominates to an office by an act of will, the decree of nomination[6]. This act has been called a special law, an expression which it is better to avoid, since, as a rule, the act of nomination is not made by the legislative

[6] Gönner, *Der Statsdienst aus dem Gesichtspunkt des Rechts*, Landshut, 1808; Zachariä, *D. St.* ii. 25 ff. Schmitthenner (*Statsrecht*, p. 509), while rejecting the 'legistic' conception of many modern jurists who, strangely enough, wish to apply the principles of Roman private law where the Romans themselves never dreamed of applying them, holds nevertheless that public services are based on contract, though it is not obligatory. This contract 'is the *causa praecedens* of the installation, just as a feudal contract preceded the investiture in a fief.' But this is an error. Antecedent contracts of the sort are only exceptions. The question, whether one will take an office or not, and the answer to it, do not constitute a contract. The contract must be a feigned one, and for that there is no reason. Where, exceptionally, there is a contract, it affects only the private and not the public rights of the parties: and thus we have here nothing to do with it. Acceptance and refusal of a nomination are certainly voluntary acts: but that does not affect the authoritative character of the decree. But cp. Löning, *ib.* p. 119.

body, but in monarchies by the king; in republics, sometimes by the government, sometimes by popular election. This decree is essentially a unilateral act of authority, even in the exceptional case where it is preceded by an actual contract, as e. g. in acquiring the services of a foreigner. Such a contract could never serve as the basis of a civil action to force the actual appointment, although it may entitle to a demand for damages, as in a private contract, if the nomination of the State is not carried out.

The functions of public service are determined by the State, and have a public and organic character. The office exists only for the State, and not for the individual who holds it. It cannot therefore become the property of a private person, nor as such become an object of private trafficking. Where anything of the sort happens, as in the middle ages, and in France even in later times, the State has not escaped from the limits of private law, and has not yet attained a full consciousness of its political existence.

Salary.

8. The salary attached to an office belongs to private law, for the salary is essentially intended to assure the material existence of the official and his family. Claims to salary may quite well be decided on by a civil judge.

But this element does not affect the essence of public office. At all times there have been unpaid honorary officials, who have the same significance in the body politic as salaried professional officials. The English Justices of the Peace are just as much State officials as the salaried Prussian *Landräthe* (prefects).

CHAPTER IX.

APPOINTMENT OF OFFICIALS.

Hereditary offices.

1. HEREDITARY offices, which were introduced everywhere in Europe in the middle ages, are as universally rejected by the spirit of modern politics. Mediæval history shows that hereditary offices become seigniories, and thus destroy the unity and order of the State. Besides, heredity is no guarantee of personal capacity.

There may in modern States be hereditary offices exceptionally, commonly where they are purely positions of honour without power, e. g. the offices about the court, which have come down from the middle ages.

Distinction between professional and honorary offices.

2. Of more importance is the distinction between professional and honorary offices. The former occupy the whole activity of a man, and form his vocation: they frequently require technical knowledge, and consequently preparatory education and apprenticeship or probation. Such offices have therefore a claim to a salary.

The latter, on the other hand, require only occasional duties, and may therefore be exercised by those who have a private vocation, as landowners, merchants, etc., and support themselves by this calling or by their private fortunes. Serving on juries, or taking part in representative assemblies, are duties which may be fulfilled in this way. Obviously it is only the well-to-do classes of society who can exercise such offices. The mass of the people lacks education, or leisure, or both.

In the modern State professional offices are the more important, but in many cases the advantages of both sorts

may be combined. Representative government and self-government afford ways in which the direction of a professional official may be combined with the assistance of representative honorary officials. Thus in Prussia the *Landrath* (prefect) is combined with the members of the departmental committee (*Kreisausschuss*); in Baden the prefect of the district (*Bezirksamt*)[a] with his district counsellors, the professional judge with jurymen and assessors.

Officials in Germany.

3. The German States, although in many respects less politically advanced than England and France, are ahead in the admirable organisation of professional offices. A capable and trustworthy class of officials is assured by the German system, according to which:—

(*a*) Offices are open to all who have the qualifications. Numerous exhibitions or bursaries (*Stipendien*) assist the poorer students, but the great number belong, as a matter of fact, to the more highly educated families, and bring with them from home a traditional culture, which in its turn helps to elevate the general level.

(*b*) As a rule, the candidates for public service must have a classical education at the *Gymnasium* and at the University. For certain technical offices, e. g. of engineers, architects, etc., the education of the *Realschule* and the Polytechnic schools is required instead. At the end of the course of study there is a government examination. The scientific spirit of the German universities refuses to limit study to mere practical preparation for a profession, and thus the defects of the Chinese system are avoided. The necessity of examination prevents the influences of party favour and court intrigue.

Yet the system must not be applied in a pedantic way. Exceptions must be made for foreigners or other persons whose talents would be useful to the State, but who have not followed the ordinary course of study. Again, there are appointments which cannot be made by examination,

[a] [For the meaning of the terms *Kreis*, *Bezirk*, &c., cp. Book III. ch. 6, above, p. 247.]

such as ministers and counsellors, or professors at the universities, where high political or scientific capabilities are required.

(*c*) After the theoretical examination follows the novitiate (*Referendar- oder Practicantendienst*), that is to say, the practical exercise as assistants to officials or lawyers. At the close of this novitiate there is commonly a second examination before the candidate himself receives an office [1].

(*d*) The State itself appoints, according to its requirements, those who have fulfilled these conditions.

Promotion is made gradually according to period of service and proof of capacity. Advance in title and rank and payment, in regular order, is the rule, but the system must not be applied in a rigid mathematical way. Seniority must not override the more important consideration of capacity, as it is apt to do where the system has degenerated into a bureaucracy.

(*e*) The salary paid by the State assures to the official a means of support corresponding to his position. Certainly most German officials are very scantily paid, if we compare their earnings with those of trade; but, on the other hand, they are protected against the uncertainties of commercial enterprise. If a certain number of honorary offices were substituted for the too numerous professional offices, the salaries of the latter could be improved.

(*f*) The German official has pragmatic rights, i.e. he has a legal claim to a fixed salary and to a retiring pension in case of age or illness.

By this system the German officials may feel that they have an assured and honourable position; they form a veritable professional order with the consciousness of their solidarity, and they have the importance of a political power. The head of the State and the representatives of

[1] R. v. Mohl, in Mittermaier's *Zeitschrift für Rechtswissenschaft des Auslandes*, xvi. p. 431 ff. Éd. Laboulaye, *De l'enseignement et du noviciat administratif en Allemagne*, in Wolowsky, *Revue*, xviii. Bluntschli, *Deutsche Rechtsschulen*, 2nd edit., p. 92 ff. Vivien, *Ét. Adm.* i. p. 205. v. Mohl, *Politik*, Bd. ii.

the people must reckon with them, and cannot dispense with their co-operation.

Officials in England.

4. The English system is totally different. Police administration and jurisdiction in the counties are entrusted to unpaid functionaries chosen from the aristocracy. Ministers are not taken from the class of permanent officials, but from the parliamentary parties. A great number of public offices are filled by party influence, without regard to any previous preparation for them, but by the patronage and recommendation of influential members of Parliament.

But even in England the need of examining candidates is felt more than it was. The higher judicial offices require a long legal education, not indeed at the universities, but at the Inns of Court, and practical experience of the profession. Examinations are now also required for a number of technical offices: incapable persons are rejected, and the influence of parties and patronage is diminished. A change of Ministry affects only about sixty posts, partly eminent political offices, partly offices of the court[2].

Officials in the United States.

5. The system of the United States was originally based on the English, but worked in a republican and democratic spirit. In the presidency of Andrew Jackson was introduced the dangerous practice of complete change ['the spoils system']. On the election of a new president, that is every four, or at least every eight years, if a different party comes into power, an immense number of posts is vacated and filled by new persons. This leads to a universal office-hunting, and the interests of the State and society are less considered than the wishes of party. Thus the whole official class is kept in an unstable condition and exposed to violent changes, and corruption is difficult to repress. The judges alone have a better guaranteed position, and the habit of selecting them from experienced advocates assures their legal acquirements and abilities.

Officials in France.

6. In France there is indeed an official class, but its

[2] R. Gneist, *Englisches Verwaltungsrecht*, 3rd edit. (1883), 230 ff.

position is less independent than in Germany. The head of the State, i. e. the Ministry for the time being, has greater power of appointing and dismissing officials, and there is less guarantee for scientific education. Special study at polytechnic, military and normal schools, is indeed required for a great number of technical offices; university education for the judicial functions. But the rule is not so generally carried out as in Germany. The official is more dependent on the government; fidelity to party is more regarded than fidelity to his office and the State.

In Republics appointments generally made for a definite period.

7. In the republics of antiquity, and partly also in those of modern times, as in Switzerland and America, the system is adopted of appointments for a fixed period of time, generally a few years, sometimes with, and sometimes without, the possibility of reappointment. This system does well enough for local offices, which, as a rule, demand no higher education, and rarely use all the powers of a man's life, but it involves great disadvantages when applied to State offices which require a long professional training, such as has become necessary in our highly developed conditions. The system involves frequent changes, favours ambition and party intrigue, diminishes the security of functionaries, and prevents the firmness and stability of political action. The advantage of the easy dismissal of incapable officials, or of those who have lost the confidence of the public, does not outweigh these disadvantages. This system is less dangerous in an aristocracy, which is naturally inclined to stability and moderation, than in a democracy which loves change and for that very reason is inclined to the system of short tenures. There is further the danger of the State losing the service of the most capable men, either through the caprice of the people or because they themselves prefer a less uncertain career.

Liberty of acceptance or refusal.

8. The individual should be free to accept or refuse an office to which he is appointed, not because the service of the State is to be based on contract, but because direct compulsion cannot properly be applied to intellectual ser-

vice and indirect compulsion is difficult and imperfect in its effects. Individual freedom is the normal source of all useful activity. No citizen can be compelled to make greater sacrifices to the State than another. This principle is recognised in almost all modern States, republics as well as monarchies[3].

Local offices are an exception: their greater number, and the small claims which they make on the individual, make them appear a universal duty of the citizen[4].

When an appointment begins.

9. The question has been debated—When an appointment begins? If we remember that the appointment is a unilateral act of the State, we can answer without hesitation: At the moment when this act is made public, is registered or signed: the notification of this to the person nominated, and his subsequent investiture, are only the consequences of a perfect nomination[5].

[3] The rule holds even in Switzerland and Norway. Cp. Story, *Commentaries on Const. U. S. A.* iii. 37, § 120. For Germany, cp. Zachariä, *D. St.* § 136.

[4] E. g. where a city has become a State, as in the case of the Free Cities of the Empire, or where, as in Canton Appenzell, the constitution is as simple as that of a commune or township.

[5] Compare on this point the dispute between President Jefferson and the Supreme Court of Justice in the United States (Story, iii. 37, § 120). The former maintained that the nomination gave no rights to the official until he had received the decree which nominated him. The latter held that the mere nomination had effect, so that the nominating government had no longer the right of annulling it.

Zachariä, *D. St.* § 136, limits the effects of the nomination to the consequences in private law. This limitation however is neither necessary nor correct. The nomination has effects, not as a private contract but as a public act of the State: and, though the actual exercise of official powers may not commence till after investiture, the right to exercise them pre-exists.

CHAPTER X.

RIGHTS AND DUTIES OF PUBLIC OFFICIALS.

Exercise of functions.

1. FIRST of all, the official has the right of exercising the functions of his office. This is called his competence, and is entirely a matter of public interest. It is at the same time his duty to exercise his functions as required, and to do so or not is not dependent on his individual will. The State may change, increase, or diminish the powers of an office.

Title and rank.

2. An official has certainly a right to the title and rank belonging to his office, but this right depends on political reasons, and may be modified by legislation. On the other hand, rank and title may remain as the private right of an ex-official.

Indemnity for expenses.

3. The right of being indemnified for expenses incurred and injury suffered in the interests of the State is a matter of private law, and belongs equally to paid and unpaid officials.

Salary.

4. There is no similar right to payment for the services themselves. It depends on the will of the State whether an office shall be paid or unpaid. A paid official has a right at private law to his salary.

A distinction may be made, as in many German States, between two elements in the payment of officials: (1) payment of rank (*Standesgehalt*), (2) payment of service (*Dienstgehalt*). It is the duty and interest of the State to maintain, in a suitable way, those officials whose whole

professional activity it employs; but there is further the expense which is involved in or connected with the actual exercise of the office (*Dienstaufwand und Representationskosten*)[1]. This distinction is of importance in the case of officials retiring from active service. They retain a claim to the former kind of payment, though none with respect to the latter. The former is in greater degree a matter of private right, the latter is bound up with the exercise of public functions. Where perquisites and fees are attached to particular offices they are to be considered of the latter character, even where they are reckoned along with the regular maintenance of the officials. The State has the right of altering such fees: it is only a matter of equity if a fixed salary is raised in order to compensate a diminution of fees: there is no legal claim to compensation.

Pension.

5. The right to a retiring pension arises from the fact that the official has a claim to his salary at private law if he is compelled to give up his office through no fault of his own. The pension should be proportioned to the salary of maintenance (*Standesgehalt*): or, if there is no distinction of this sort formally recognised, the expenses of actual tenure of office must be deducted in fixing the pension. It is expedient that the amount and conditions of pensions should be definitely fixed by law, in order to avoid anything arbitrary in the awarding of them. A general system of pensions constitutes a heavy burden on the treasury, but such a burden cannot well be avoided where the State requires professional officials. The income of a government official is in most cases very small, compared with the earnings of commerce and industry, and commonly requires higher intellectual qualifications and more education. It is therefore a duty of the State to assure those who devote their lives to it against want. The public is compensated for the expense by better service, and the temptations to corruption are avoided.

[1] Gönner, *ibid.* 144. 'Beilage' ix. to the Bavarian Constitution, §§ 17–19.

The widows and orphans of State servants have no legal claim to a pension. The salary is not hereditary. Many States have the good arrangement of a public pension-fund, chiefly maintained by deductions from official salaries.

6. The duties of officials mostly follow from their rights: they owe, further, obedience to their superiors, fidelity to the head of the State and to the nation, and, if occasion requires, secrecy. The oath of office, which is commonly demanded, does not create this obligation, but only strengthens it. It is not the condition of the official's duties, nor does it modify their extent. Duties of

The kind of obedience varies according to the nature of the particular function. It is different for administrative and for judicial functionaries. The latter must obviously occupy, on the whole, an independent position, but even the former are not bound to an absolute or servile obedience. Limits are imposed by both law and morality: in particular cases the extent of the obligation to obedience may raise very difficult questions. Obedience.

(*a*) An official may examine if the order he receives is regular in form, i.e. if it is one which his superior is by his office entitled to give, and not due to some caprice, and if it is within the sphere of his own office to execute: he may further refuse to carry out an order which is not signed, if a signature is required. He is a public functionary, and not a private servant, and is therefore competent to examine the form of orders as a test of their legality.

If the question of competency is doubtful, and the superior affirms his right to give the order, the inferior must obey. His sole right, and at the same time his duty, is to put his scruples before his superior, and to await a repetition of the order.

(*b*) In no case can an official be bound to render obedience which would violate the higher principles of religion and morality, or make him accomplice in a crime. Such acts can never be the duty of his office. The servant of the State cannot be required to do what a man would refuse

from humanity, a believer from religion, or a citizen from regard to the criminal law of the land[a].

(*c*) The subordinate official cannot refuse to obey an order, the object of which appears to him illegal or unjust. He can only make representations on the subject to his superior. He ought to presume that his superior does not wish to violate the law, and that he has not considered the matter sufficiently, and may be led to alter his decision by respectful and frank expression of opinion. An official should not fail to save his superiors and the State from mistakes, but if the superior abides by his orders obedience is due, and the superior must bear the responsibility. To authorise resistance in such cases would be to destroy the unity of the State, to paralyse its power, and would lead to far worse consequences than single violations of the law[b]. The same is to be said of unconstitutional commands. The subordinate must not, by resisting, himself violate constitutional obedience.

[a] [There is surely a confusion here between the *moral* duty of the individual and his *legal* duty as an official. As 'a counsel of perfection,' it is the duty of a government to respect morality, but it cannot be the *right* of an official to resist on other than legal and constitutional grounds. An official certainly cannot be required to break 'the law of the land'—criminal or civil—but if he receives an order, which he regards as contrary to (his) religion or morality, he cannot claim, *on that ground alone*, to set it aside and yet retain the position of an official. The next paragraphs (*c*) and (7) put the case accurately, but they appear to contradict what Bluntschli says here.]

[b] Several constitutions formally express this principle, e. g. the Hanoverian Constitution of 1883, § 161: 'An order issued in proper form by a superior official imposes no responsibility on the inferior who receives it, but on the superior who issues it.' So in the Constitution of Meiningen, § 104, and of Altenburg, § 37: 'The responsibility for every illegal act belongs to him who orders it. The orders of a higher official are only an excuse if they are in proper form, and have been issued by a competent authority, who then becomes responsible for them.' Gönner, *ib* § 79, appears to understand the *gloria obsequii* in the same way, but he uses an unfortunate expression when he speaks of the official as a 'machine'; for he recognises the duty of remonstrance against unjust commands, and limits the duty of obedience both in form and object, p. 208. Besides, the expression 'machine' has a monkish flavour. Cp. on this contested point Schulze, *Deutsches Statsrecht*, i. 325 ff.; Laband, i. 427 ff.; Löning, *Verwaltungsrecht*, p. 122 ff.

7. The spirit of fidelity (*Treue*) goes further than the duty of obedience. The latter is fulfilled when the official carries out the order given him strictly in form and substance. The former binds him in the whole of his conduct. Fidelity or loyalty is not, indeed, as in the feudal system, the main principle of society: the duties of officials are now determined by legislation. It is not so much a personal allegiance to his prince as the requirements of the State which influence his action. Nevertheless, fidelity still forms the basis of the harmony and moral cohesion of the public service. Fidelity.

An official who, in important though isolated points, holds, and on occasion expresses, political convictions different from those of his superiors, does not thereby violate the duty of fidelity. But if on permanent and fundamental principles he finds himself in opposition to the government, and hostile to it; if, e.g. in a monarchy, he is a declared republican, and works for the establishment of a republic, or *vice versâ*, he breaks the bond of fidelity, and ceases to be a harmonious member of the whole. It is the same with a functionary who takes part in systematic and continuous opposition intended to overthrow or impede the government. This is a breach of fidelity which no government can tolerate without falling into anarchy[3]. Systematic hostility to the ministry, although there is no particular act of disobedience, is likewise a breach of fidelity. An official

[3] Washington (quoted in Guizot's Pref. to his Life, i. p. xxiii): 'As long as I shall have the honour to govern the public affairs, I will never knowingly place in any important office any man whose political maxims are contrary to the general measures of the government. This would be in my opinion a kind of political suicide.' [Letter to Timothy Pickering, *Writings*, vol. xi. p. 74, quoted in Guizot's *Essay*, Eng. trans. p. 84.] How strongly German statesmen have felt the evils which accrue to the State from unfaithful officials, may be seen from the following passionate utterances of Stein (Pertz's *Life* of him, ii. p. 501): 'We cannot overcome the insolence and turbulence in the disposition of most of the public officials except by rigorous measures, prompt removal, imprisonment or banishment of those who in this way spread dangerous opinions, or undermine the authority of the government.'

may have absolutely divergent, and even hostile convictions, without ceasing to be faithful in his office. But he must not in his official position express such sentiments. If he believes himself conscientiously bound to declare his hostility in word and deed, he ought to resign his office. It is obvious that judges are in a more independent position. Their office is not political in character, and not dependent on the will of the government.

A further consequence of official fidelity is that no official accept service under a foreign State, or decorations, pensions, or other distinctions of the sort without permission of his own government.

Secrecy.

8. Official secrecy is not to be understood in an absolute sense, but only so far as specially ordered, or in matters where the revelation of information, officially obtained, would injure the State or individuals. Two extremes have to be avoided, a pedantic maintenance of mystery, or a mischievous concealment of unconstitutional and illegal action on the one side; indiscreet gossiping on the other.

Punishment and discipline.

9. The State can reprimand or punish functionaries who neglect or violate their duties. Crimes, which can be prosecuted and punished before the ordinary courts, are to be distinguished from neglect of duties, which renders a person liable to official discipline. The former are judged by the ordinary law of the land, the latter more specially from the point of view of the public interest. This distinction is the same as that between Justice (*Gericht*) and Police (*Polizei*). The former, as we have said, are proceeded against at criminal law, but the State has in some cases modified this in its own interest: (1) according to the French practice[b], the criminal prosecution of an official for an official crime can only take place with the authorisation of the government, or an authority specially empowered, or

[b] [Art. 75 of the Constitution of the year VIII, abolished by decree of Sept. 19, 1870 (*Fr. trans.*).]

(2) there are special courts to try officials[4]. The English practice rejects both these exceptional rules, but protects its aristocratic officials by other means against frivolous attacks[5].

Official discipline goes further, and applies in cases where the ordinary law could find no sufficient ground for a charge, and even in cases where it would have acquitted the accused. It extends to all the faults and negligences of the functionary, even to his private life, so far as that may injure the honour and confidence which his office should receive[6].

Disciplinary punishments are either slight, such as warning, reprimand, and limited fine; or they are severe, such as suspension from office, removal to another place, compulsory retirement, or dismissal. The infliction of the slighter punishments is one of the ordinary powers of the superior officials, and requires no special legal proceeding. The severer, on the other hand, require a legal proceeding in order to protect the rights of officials against

[4] According to the Imperial Law, *Über die Einführung des Gerichtsverfassungsgesetzes*, § 11, those laws of the various particular States (*Landesgesetze*) remain in force which make the civil or criminal prosecution of an official, on account of any act committed directly or indirectly in the exercise of his office, depend on a previous decision (*Vorentscheidung*). Such previous decision can, however, only determine whether the official has exceeded the powers of his office or has omitted a duty incumbent upon him. In those German States in which there is a Supreme Court of Administration this decision is pronounced by such court, in the other States by the Imperial Court. Federal laws of this sort exist in Prussia, Bavaria, Baden, Hesse, &c. (cp. Löning, *Verwaltungsrecht*, p. 126). In France the requirement of a previous decision has been abolished by the decree of Sept. 19, 1870. On the nature of discipline as distinct from punishment of officials very different views are held. Cp. Löning, *op. cit.* p. 127 ff.

[5] Fischel, *Verfassung Englands*, p. 351; Homersham Cox, *English Institutions* [? pp. 442, 457, edit. 1863. The Attorney-General can stay proceedings.] The history of the Negro revolt in Jamaica shows how difficult it is even in England to carry on a successful prosecution against powerful officials, even for frightful misuse of authority. Cp. Gneist, *Engl. Verwaltungsrecht*, p. 376 ff. [On the contrast between the French and English practice see Dicey, *Law of the Constitution* (ed. 3), ch. xii: 'The rule of law contrasted with *droit administratif*.']

[6] *Reichsbeamtengesetz* of 1873, § 70.

an arbitrary use of power. In many States the punishment of dismissal can only be inflicted by the ordinary law courts; but ordinary justice is apt to judge the fault as if it were only that of a private citizen, to take too much account of the man, and too little of the official. This system places the interest of the official for the time being above the permanent interest of the office and of the State, the rights of the individual above the rights of the community. A court of justice which has to decide on a matter of such public importance must be composed in such a way as to be able to appreciate the interests involved. Failing such a court, the right of dismissal must remain in the hands of the higher government officials[7].

[7] *Reichsbeamtengesetz* of 1873, § 76.

CHAPTER XI.

TERMINATION OF PUBLIC SERVICE.

OFFICE does not exist for the sake of the official, so that if an office comes to be suppressed, the official can no longer remain such. Public interest alone must settle the nature and continuance of an office, but the suppression of an office does not put an end to the claims of the official to his maintenance, which continue as long as they would have done if the office had not been abolished. 1. Suppression of an office.

Since the acceptance or refusal of office is usually a matter of free choice, so also is resignation; but the two are not quite on the same level. The freedom of undertaking an obligation does not imply the freedom of shaking it off. In a case where the ability and good-will of the individual are so important as in public offices, compulsory continuance of service is inexpedient[1]. On the other hand, where acceptance of office is a compulsory civic duty, its continuance, at least for a definite period, is likewise compulsory[2].

Resignation does not of itself bring the duties of an 2. Resignation.

[1] Prussian *Landrecht*, ii. 10. § 95: 'The resignation of an official shall only be refused if the general welfare should seriously suffer by its being accepted.' Bavarian Edict of 1818, § 22: 'Any one in the service of the State may resign when he pleases without assigning any reason: but in such a case he loses all his salary as well as the title and insignia of office.'

[2] Thus in England the sheriff (*scire-gerefa*) who has held the office for a year is free from the obligation of taking it for the next three years. Blackstone's *Commentaries*, i. 9. 1.

office to an end. An arbitrary abandonment of office would be desertion. Resignation is only a means of moving the State to withdraw the office it has given. Official duties are not at an end before the State has accepted the resignation, and the time when they terminate may be fixed by the authorities according to public convenience.

Termination of office in consequence of simple resignation puts an end to the private as well as the political rights attached to it.

3. Retirement. It is otherwise if a public servant has the right of demanding to be placed on the retired list (*Quiescirung*, *Inruhestandsetzung*). This puts an end to the public powers of the official, but leaves him his rank, title, and a claim to payment. The amount of pension is commonly regulated according to age or length of service. The right to a retiring pension is based partly on advanced age (in Bavaria 70, in Prussia, Würtemberg, Saxony, Belgium, 65 years) combined with long service (30 to 40 years), partly on incapacity arising e. g. from ill health. The latter only constitutes a legal claim to a pension if it has been brought on by the service itself, for in such a case the State is bound to compensate the injuries incurred in the exercise of public duties[3].

4. Dismissal. Involuntary dismissal is differently regulated in different countries. In the time of the old German Empire [the Holy Roman Empire], through the influence of jurists, the private rights of the officials were brought into great prominence. Office was considered as a right bestowed usually for life, and not to be withdrawn, except for violation of duty, by a judicial decision[4]. There were indeed

[3] Zacharlä, *D. St.* § 142, collects some rules on this point in German States. Cp. Löning, *Verwaltungsrecht*, p. 134 f. As to Belgium, cp. the Law of July 31, 1844.

[4] This is formally expressed in the electoral capitulation (*Wahlcapitulation*) of 1792 as to the members of the aulic council of the Empire (*Reichshofrath*), § 10: 'No councillor can be dismissed except after judicial examination of the case, and by a sentence based thereon.' Cp. also the decision of the Deputation of the Empire (*Reichsdeputations-Hauptschluss*) of 1803, § 91.

some protests that an honourable dismissal might be justified from grounds of public interest, but towards the end of the last century the first opinion was more and more widely diffused; and in many modern constitutions this principle was proclaimed as an advance in liberty and an important guarantee against arbitrary government, not only in Germany [4a], but more recently even in Switzerland, where most offices are only bestowed for limited periods.

In England, on the other hand, party struggles have long kept the political consciousness awake to the fact that office is given chiefly for the sake of the State, and not of the individual: so much so that the principle became established that the head of the State had full right of taking away as of bestowing office. An exception was introduced in the case of the judges, in order to ensure their independence. Under William III it was decided that the common law judges should not be appointed as before, '*durante bene placito*,' but '*quam diu bene gesserint*,' the King and Parliament remaining the sole judges of good conduct [5]. The United States of North America adopted similar principles [6]. In France administrative officials have always remained liable to dismissal at will, though from the fifteenth century judges have been irremoveable. As a matter of fact, however, even in France, officials enjoy a tolerably secure position, except in revolutionary times [7].

The German system exaggerates the importance of private rights, but if these are not made to override the welfare of the State, it has advantages over the arbitrary practice of other constitutional States. It assures the private interest

[4a] Bavaria is the only German country in which the ordinary Criminal courts alone can dismiss administrative officials: in the other states dismissal is regarded as a disciplinary punishment. So too in the Empire. Cp. *Reichsbeamtengesets* of 1873, §§ 84, 86.

[5] Statute 13 Will. III. cap. 3. Until the time of George III the office of judge was terminated by the death of the king. Cp. Gneist, *Engl. Verwaltungsrecht*, p. 236 ff.

[6] Cp. Story, iii. 38. § 228.

[7] Vivien, *Étud. Administr.* i. 260 f.

of the functionary, and secures the State against party agitation and caprice.

In any case it is a fundamental principle that the office exists for the State, and therefore the State can in the public interest dismiss and replace an official. These two rights naturally belong to the same person, i.e. in case of doubt, to the head of the State[8]. This must be recognised even in those States in which only the law courts have the power of dismissal, so far as deprivation of office has merely political (and not also personal) consequences[9].

These rules admit of two restrictions, (1) in behalf of the independence of the judges, (2) in the interest of the functionaries themselves. In modern times the principle is commonly recognised that judges can neither be dismissed nor transferred against their will, and cannot be put on the retired list without retaining their full salary. In England judges can only be removed by a decision of Parliament, in Germany by a judicial sentence[10].

With regard to the second restriction, different cases must be distinguished. The reasons for removing an official may be—

(*a*) A crime, which shows his moral unfitness for the office.

(*b*) Proved moral incapacity (negligence, cowardice, &c.) without crime.

[8] The President of the United States of North America had, by the Law of 1789, the sole right of removing officials, who could not be appointed without the concurrence of the Senate (Story, iii. 37. § 119). This was illogical, but was not altered till 1867.

[9] Zachariä, § 144. There are however some States which do not recognise this principle, and even go so far as to make office for a certain time irrevocable on public grounds.

[10] *Bavarian Constitution*, viii. § 3: 'Judges cannot be removed with loss of salary except by a judicial sentence.' *Belgian Constitution*, Art. 100: 'Judges are appointed for life. No judge can be deprived of his place or suspended except by a judicial sentence. A judge cannot be transferred except by a new nomination and with his consent.' *Spanish Const.* Art. 10: *Portuguese Const.* Art. 120–123: *Austrian Fundamental Law* (*Statsgrundgesetz*) of Dec. 21, 1867, Art. 6: *Prussian Const.* § 87: *Rechtsgesetz über die Gerichtsverfassung*, § 8.

(*c*) Intellectual incapacity, e. g. loss of memory, insanity, &c.

(*d*) External circumstances which injure an official's activity or deprive him of public confidence, a case which may occur, in times of agitation or through foreign complications, to an official who has fulfilled his duty, nay, even just because he has done so. Thus the minister Stein was dismissed to please Napoleon I.

In all these cases the State must possess the means of protecting itself against injury by removing officials. It is only in the first of these (*a*) that the law courts are adapted to decide the matter according to their ordinary procedure. A judicial removal brings with it loss of title, rank, salary, and claim to pension.

The second case (*b*) is more a matter for official discipline than for the ordinary courts, but the official must always have the opportunity of defending himself. According to the greater or less degree of his fault, there will follow dismissal, with loss of all claim to salary, but without any injury to his remaining political rights, or he will merely be placed on the retired list with a suitable pension. In the latter case the government can obviously act more freely, because the private rights of the official are not affected.

The third case (*c*) justifies compulsory retirement as a rule, but not dismissal, the official not being himself to blame.

The fourth case (*d*) may be met either by compulsory retirement or by transference to a different post of the same character, dignity, and emolument.

These two last cases should be referred to the highest authorities in the government, and when the appointment is made by the chief of the State, his assent or command should be required for removal.

A purely arbitrary removal without reason assigned, and without opportunity of defence, is still practised in several States, but is not in accordance with a well ordered system.

Temporary suspension may be inflicted either as a penalty or as a measure of prudence. In the former case it may be

5. Suspension.

inflicted either by the law courts, or as a measure of discipline by a competent authority. It usually implies loss or reduction of salary for the time it lasts.

As a provisional measure it may be provided by the law beforehand in certain cases, e.g. because of a criminal charge, but it may also be adopted by the authorities as a means of withdrawing an unpopular official from the storm he has excited. Suspension should not involve loss of private rights, except when it is a punishment: the official should retain that part of his emolument which has a private character, especially his maintenance (*Standesgehalt*). If he is suspended on account of a criminal charge he shall retain these private rights, though the court may order the retention of his salary, as a guarantee for the fine and damages to which he may be made liable, but not until he is condemned is his claim for future payment at an end[11].

[11] Cp. Zachariä, § 145 against Heffter.

THE END.

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